

• **REPORTS**
OF
Certain Cases,
ARISING
In the severall Courts
OF
RECORD
at WESTMINSTER;

In the Raignes of Q. *Elizabeth*, K. *James*,
and the late King CHARLES.

With the Resolutions of the Judges of the said
Courts, upon Debate and solemn Arguments.

Collected by very good Hands, and lately Re-viewed,
Examined, and Approved of by the late Learned
Justice **GODBOLT**.

And now Published by **W: HUGHES**
of GRAYS-INNE. *Esquire.*

With two TABLES, one of the *Cases*, the
other of the *Principall Matter* therein contain'd.

*Quid juvat Humanos scire & cognoscere Casus;
Si fugienda facis, & facienda fugis.*

London, Printed by T. N. for *W. Lee*, *D. Pakeman*,
and *G: Bedell*, M. DC. LIII.

REPORT
OF
COTTON GATES

In the several Courts

RECORD

In the High Court of Chancery,
and the said Courts

of the said High Court of Chancery,
and the said Courts

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and the said Courts

and now Published by
J. G. G. G. G.

With two Tables, one of the
said Courts

Printed by J. G. G. G. G.

London: Printed by J. G. G. G. G.



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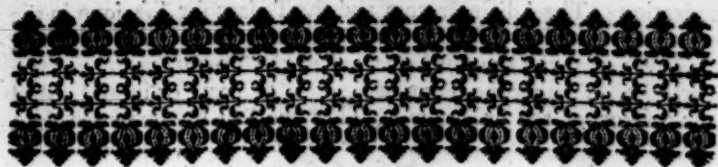
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Mich.



Mich. 17. Eliz. In the Kings Bench.

I.



His Case was moved to the Court. If an Abby hath a Parsonage appropriate in *D.* which is discharged of payment of Tithes, and afterward the Abbot purchaseth part of the lands in the same Town and Parish where the Parsonage is: That this land so purchased is discharged of Tithes in the hands of the Abbot; For the Tithes were suspended, during the possession of the Abbot, in his own hands. But after that, the Abby was surrendred into the hands of the King, Anno 30. *H. 8.* And afterwards the same possessions &c. were given to King *H. 8.* by the Statute of 31. *H. 8.* cap. 13. as they were in the hands of the Abbot. The question was, Whether the Land so purchased by the Abbot before the surrender, were discharged of payment of Tithes by the Statute, or not. And the opinion of Mr. *Plowden* was, That they were not discharged of Tithes by the Statute: For that no lands are discharged by the Statute, but such lands as were lawfully discharged in right, by composition, or other lawfull thing. And the lands in this case were not discharged in right, but suspended during the possession of the Abbot, in his own hands. And so hee said it is, when the Land is purchased by one, and the Parsonage by another, the right of Tithes is revived, and the lands charged as before the purchase of the Abbot. And so, he said, it had been adjudged.

Pasc. 17. Eliz. In the Common Pleas.

2.

A Man makes a Lease for Life, and afterwards makes a Lease unto another for Years, to begin after the death of Tenant for life; The Lessee for yeers dieth intestate; The Ordinary commits Administration;

B

nistration;

nistrat[i]on; The Administrators and the Tenant for life joyn in the purchase of the Fee-simple: Two questions were moved; The first was, Whether the Fee were executed in the Tenant for life for any part? 2. Whether the Term were gone in part, or in all? And the opinion of the Justices was, That the Fee was executed for a moitie. *Manwood*. If the Land be to one for life, the Remainder for yeeres, the Remainder to the first Tenant for life in Fee, there the Fee is executed; so as if he lose by default, he shall have a Writ of Right, and not *Quod ei de forceat*; for the term shall be no impediment that the Fee shall not be executed: As a man may make a lease to begin after his death, it is good, and the Lessor hath Fee in possession, and his wife shall be endowed after the Lease. And I conceive, in the principall case, That the term shall not be extinct; for that it is not a term, but *interesse termini*, which cannot be granted nor surrendered: *Mounfan*. If he had had the term in his own right, then by the purchase of the Fee, the Term should be extinct. But here he hath it in the right of another as Administrator. *Dyer*. If an Executor hath a term, and purchaseth the Fee, the term is determined: So, if a woman hath a term, and takes an husband who purchaseth the Fee, the term is extinct. *Manwood*. The Law may be so in such case, because the Husband hath done an act which destroyes the term, viz. the purchase. But if the woman had entered married with him in the Reversion, there the term should not be extinguished; for the Husband hath not done any act to destroy the term; But the marriage is the act of Law. *Dyer*. That difference hath some colour. But I conceive, in the first case, That they are Tenants in common of the Fee. *Manwood*. The Case is a good point in law. But I conceive the opinion of *Manwood* was, That if a Lease for yeeres were to begin after the death, surrender, forfeiture or determination of the first lease for yeeres, that it shall not begin in that part, for then perhaps the term in that part shall be ended, before the other should begin.

Pasc. 20 Eliz. in the Common Pleas.

3.

A Man seised of Copyhold land descendable to the youngest Son by Custome; and of other Lands descendable to the eldest Son by the common Law; leaseth both for yeeres: The Lessee covenanteth, That if the Lessor, his wife and his heirs will have back the land, That then upon a yeeres warning given by the Lessor, his wife or his heirs, that the Lease shall be void. The Lessor dieth; the Reversion

on

on of the customary Land descends to the younger son, and the other to the eldest, who granteth it to the younger ; and he gives a yeers warning according to the Covenant. *Fenner*. The interest of the term is not determined, because a speciall heir, as the youngest son is, is not comprehended under the word [Heir ;] but the heir at common Law, is the person who is to give the warning to avoid the estate by the meaning of the Covenant. But *Manwood* and *Mounson*, Justices, were cleer of opinion ; That the interest of the term for a moiety is avoyded ; for the Condition, although it be an entire thing, by the Descent, which is the act of Law, is divided and apportioned ; and the warning of any of them shall defeat the estate for a moiety, because to him the moiety of the Condition doth belong : But for the other moiety, he shall not take advantage by the warning, because that the warning is by the words of the Condition appointed to be done by the Lessor, his wife, or his heirs : And in that clause of the Deed the Assignee is not contained. And they agreed, That if a Feoffment of lands in Borough-English be made upon condition, That the heir at common Law shall take advantage of it. And *Manwood* said, that hee would put another question, Whether the younger son should enter upon him or not? But all Actions in right of the Land, the younger son should have ; as a Writ of Error to reverse a Judgment, Attaint, and the like. *quod nota.*

Pasc. 22 Eliz. in the Common Pleas.

4

IT was holden by *Meade* and *Windham*, Justices of the Common Pleas, That a Parsonage may be a Mannor : As, if before the Statute of *Quia emptores terrarum*. the Parson, with the Patron and Ordinary, grant parcel of the Glebe to divers persons, to hold of the Parson by divers Services, the same makes the Parsonage a Mannor. Also they held, That a Rent-Charge by prescription, might be parcel of a Manor, and shall passe without the words *cum pertinentiis*. As, if two Coparceners be of a Manor and other Lands, and they make partition, by which the eldest sister hath the Manor, and the other hath the other Lands ; and she who hath the Lands grants a Rent-charge to her sister who hath the Manor, for equality of partition. *Anderson* and *Fenner* Srjeants, were against it.

Hill. 23 Eliz. In the Common Pleas.

5.

THis Case was moved by Serjeant *Periam*; That if a Parson hath Common appendant to his Parsonage, out of the lands of an Abby, and afterwards the Abbot hath the Parsonage appropriated to him and his Successors: Whether the Common be extinct? *Dyer*, That it is: Because he hath as high an estate in the Common as he hath in the Land. As in the case of 2 *H.* 4. 19. where it is holden, That if a Prior hath an Annuity out of a Parsonage, and afterwards purchaseth the Advowson, and then obtains an Appropriation thereof, that the Annuity is extinct. But *Windham* and *Meade* Justices, conceived, That the Abbot hath not as perdurable estate in the one as in the other; for the Parsonage may be disappropriated, and then the Parson shall have the Common again. As if a man hath a Seignorie in fee, and afterwards Lands descend to him on the part of the Mother; in that case the Seignory is not extinguished, but suspended: For if the Lord to whom the Land descends dies without issue, the Seignorie shall go to the heir on the part of the Father, and the Tenancy to the heir on the part of the Mother; And yet the Father had as high an estate in the Tenancy as in the Seignory. And in 21 *E.* 3. 2. Where an Assize of Nufance was brought for straightening of a way which the plaintiff ought to have to his Mill: The defendant did alledge unity of possession of the Land, and of the Mill in W. and demanded Judgment, if &c. The plaintiff said, that after that, W. had two daughters, and died seised; and the Mill was allotted to one of them in partition, and the Land to the other, and the way was reserved to her who had the Mill: And the Assize was awarded. And so by the partition the way was revived, and appendant as it was before: and yet W. the Father had as high an estate in the Land, as he had in the Way.

Hill. 23 Eliz. In the Common Pleas.

6.

A Man makes a Feoffment in Fee of a Manor, to the use of himself and his Wife, and his heirs: In which Manor there are Underwoods usually to be cut every one and twenty yeers; and afterward the Husband suffers the wood to grow five and twenty yeers, and afterwards hee dieth. The question was, Whether the Wife, being

being Tenant for life, might cut that Underwood? And it was moved, What shall be said seasonable Underwood, that a Termor or Tenant for life might cut? *Dyer* Chief Justice, and all the other Justices held, That a Termor or Tenant for life, might cut all Underwood which had been usually cut within twenty years. In 11. H. 6. 1. Issue was taken, If they were of the age of twenty yeers, or no. But in the Wood-Countries they may fell seasonable wood which is called *Sylva cadua*, at six and twenty, eight and twenty, thirty years, by the custome of the Country. And so the Usage makes the Law in severall Countries. And so it is holden in the books of 11. H. 6. and 4. E. 6. But they agreed, That the cutting of Oakes of the age of eight yeers, or ten years, is Waste. But by *Meade* Justice, the cutting of Hornbeams, Hasels, Willows, or Sallows of the age of forty yeares, is no Waste, because at no time they will be Timber. Another question which was moved was, That at the time of the Feoffment it was seasonable Wood, and but of the growth of fourteen or fifteen years: If this suffering of the Husband of it to grow to 25 years, during the Coverture, should bind the Wife, so as she cannot cut the Woods. *Gandy* Serjeant said, That it should not bind the Wife; For if a Warranty descend upon a Feme Covert, it shall not bind her. So if a man seized of Land in the Right of his Wife be disseised, and a Descent be cast during the Coverture, it shall not bind the Wife, but that she may enter after the death of the Husband: But by *Dyer* Chief Justice, and all the other Justices, This Permission of the Husband shall bind the Wife, notwithstanding the Coverture; for that the time is limited by the Law, which cannot be altered, if it be not the custome of the Country. As in the case of 17. E. 3. Where a man makes a Lease for years, and grants that the Lessee shall have as great commoditie of the Land as hee might have. Notwithstanding these words, he cannot dig the land for a Mine of Cole or Stone; because that the Law forbids him to dig the land. So in the principall Case, The Wife cannot fell the Wood, notwithstanding that at the time of her estate she might; and afterwards by the permission of the Husband, during the coverture; the time is incurred, so as she cannot fell it, because the Law doth appoint a time, which if it be not felled before such time, that it shall not be felled by a Termor, or a Tenant for life, but it shall be Waste.

Lutius proutis legi q Romanis

Hill. 23. Eliz. In the Common Pleas.

7.

A Man makes a Lease of a Garden, containing three Roodes of Land, and the Lessee is ousted, and he brings an *Ejectione firme*, and declares that he was ejected of three Roodes of Land; Rodes Sergeant, moved, That by this Declaration it shall be intended, that he was ejected of the Garden, of which the Lease was made, and so the *Ejectione firme* would lie. And it was holden by the Lord Chief Justice Dyer, That a Garden is a thing which ought to be demanded by the same name in all *Precipes*; as the Register and *Fitz. N. Brevium* is. And this Action is greater then an Action of Trespasse, because by Recovery in this Action, he shall be put into Possession. But Meade and Windham Justices, contrary: And they agreed, that in all reall Actions, a Garden shall be demanded by the name *Gardinum*; otherwise not. But this Action of *Ejectione firme* is in the nature of Trespasse; and it is in the Election of the Party to declare, as here he doth; or for to declare of the Ejectment of a Garden; for a Garden may be used at one time for a Garden; and at another time be ploughed and sowed with Corn. But they conceived that the better order of pleading had been, if he had declared that he was ejected of a Garden containing three Roodes of Land, as in the Lease it is specified.

Hill. 23. Eliz. In the Common Pleas.

8.

Sergeant Fenner moved this case. That Land is given to the Wife in tail for her Joynture, according to the Statute of 11. H. 7. The Husband dieth, the Wife accepts a fine, *Sur consens de droit come ceo, &c.* of a Stranger: And by the same fine grants and renders the Land to him for an Hundred years; whether this acceptance of a Fine and Render by the Wife were a forfeiture of her estate, so as he in the Reversion or Remainder might enter by the Statute. Mead and Dyer Justices; it is a forfeiture, and Mead resembled it to the Case in 1 H. 7. 12. where it is holden, That if Tenant for life do accept of a Fine *Sur consens de droit come ceo, &c.* that it is a forfeiture, and the Lessor may enter. But Fenner asked their opinions, what they thought of the principall case, But *hastaverunt*, because they

they said it was a dangerous case, and is done to defraud the Statute of 11. H.7.

Pasch. 23. Eliz. in the Common Pleas.

9.

A Man made a Feoffment in Fee to two, to the use of himself and his wife, for the term of their lives, without impeachment of waste during the life of the Husband; the remainder after their decease to the use of *I.* his son, for the term of his life. And further by the same Deed, *Vult & concedit*, that after their three lives, viz. of the Husband, Wife, and Son, that *I. S.* and *I. D.* two other Feoffees, shall be seized of the same Land, to them, and their heirs, to the use of the right Heirs of the body of the Son begotten. It was moved, That by this deed, the two later Feoffees should be seized to the use of the right Heirs of the body of the Son begotten, after the death of the Husband, Wife, and the Son. But it was holden by all the Justices, That the second Feoffees had not the Fee, because by the first part of the Deed, the Fee-Simple was given to the first Feoffees; and one Fee-Simple cannot depend upon another Fee-Simple: Notwithstanding, that after the determination of the former uses for life, the Fee-Simple should be vested again in the Heires of the Feoffer; and that the words, That the second Feoffees should be seized, should be void. But *Dyer* Chief Justice, and the other Justices, were against that, because there wanted apt words to raise the later use: As if a man bargain, and sell his Reversion of Tenant for Life, by words of Bargain and Sale only, and the Deed is not Enrolled within the six months, but afterwards the Tenant for Life doth attorne, yet notwithstanding that, the Reversion shall not passe, because [Bargain and Sell] are not apt words to make a Grant: And that Case was so adjudged in the Common Pleas as the Lord *Dyer* said. So in the principall Case, and therefore the later Use was utterly void, and shall not be raised by intendment. But otherwise it had been, if it had been by devise.

Pasch. 23. Eliz. in the Common Pleas.

10.

IT was holden by all the Justices of the Common Pleas, That the Queen might be put out of her Possession of an *Advowson* by two Usurpati-

Usurpations; And she shall be put to her Writ of Right of Advowson, as a common person shall be, because it is a transitory thing; and that the Grant of that Advowson made by the Queen after the two Usurpations, should be void; and that was so adjudged upon a demurrer in the point. And so it is holden in 47 E.3.46.

Psch. 23. Eliz. in the Common Pleas.

11.

AN Indenture of Covenant was made betwixt *I. S.* and *I. D.* in which *I. S.* did Covenant to Enfeoffe *I. D.* of his Manor of *D.* In consideration of which, *I. D.* by the same Indenture, did Covenant with the said *I. S.* to pay him 100 li. The Question is, If *I. S.* will not make the Feoffment, whether *I. D.* be bound to pay the money? It was holden by the Lord *Dyer* Chief Justice, and Justice *Mead*, That he is not, because the money is Covenanted to be paid Executory to have the Feoffment made; and therefore if he will not make the Feoffment, he shall not have the money. As if I Covenant with one, That I will marry his Daughter; and he Covenants with me, That for the same cause, he will make an Estate to me and his Daughter, and to the Heirs of our two bodies begotten, of his Manor of *D.*; he shall not make it untill we are married. But if I Covenant with a man, That I will marry his Daughter; and he Covenants with me, To make an Estate to me and his Daughter; if I marry another woman, or if the Daughter marryeth another man, yet I shall have an Action of Covenant to compell him to make the Estate, because in this later Case, the Covenant was made for another Cause. And this difference was so taken by the whole Court, 15 H.7.10. So if *A.* grant to *B.* all the ancient Pale, and for that, *B.* grants, That he will make a new Pale; it is holden in 15 E.4.4. by *Catesby*, and affirmed by *Listleton*, That if *B.* cannot have the ancient Pale, that he shall be excused from making the new Pale. But if two things are given by two Persons, one for the other, there if one of them detain the one, the other cannot detain the other, as is 9 E.4. 20. and 15 E.4. 2. It is holden, That if one grant Tithes in Fee, by one Deed, and by the same Deed, for the same Grant, the Grantee grant to the same Person an Annuity of 20 li; That if the Grantor of the Tithes, enter into the Tithes, yet the Grantee cannot detain the Annuity, because the grant of the Tithes is executed in him, and he may have an Action for them, if the other enter upon them. But in the principall Case; The Covenant was but Executory for the other, and then if one be not performed, the other shall never be performed:

Windham

Windham and *Periam* Justices, conceived the contrary : and therefore the case was adjourned, and a demurrer in law upon it.

Pasch. 23 Eliz. in the Common Pleas.

12.

Tenant in taile, the Remainder in Fee ; the Tenant in taile makes a Lease for life according to the Statute of 32 H. 8. and afterwards dieth without issue : and before any entrie, he in the remainder grants his Remainder by Fine : Whether the Conusee of the Fine may enter upon the Tenant for life, and avoid his Lease, was the question. *Fenner* Serjeant, Hee cannot : because when a Free-hold is given by Livery, it cannot be defeated without Entrie, As, If a Parson make a Lease for life, rendring rent, and dieth, and his successor accept the rent, the lease is affirmed, as it is holden in 11. E. 3. and 18. E. 4. The Case was, That a man made a Lease for life, the remainder in Fee ; Tenant for life granted over his estate : and then a *Formedon* was brought against the Grantee, and then the first Tenant for life died : And by all the Justices (except *Littleton*, and divers Serjeants) the Writ shall not abate, if he in the Remainder hath not entred. So in the principall case, When he had made a Lease for life, and afterwards died without issue, living the Tenant for life, ; his estate is not defeated before entrie of him in the Remainder : And then, when before entrie, he in the Remainder grants his Remainder, the Grantee shall have it but as a Remainder ; for so is his grant : and so the estate of Tenant for life which was but voidable, is made good : And so was it holden by *Windham* and *Periam*, Justices : but *Meade*, and *Dyer* Chief Justice did conceive, that by the death of Tenant in taile without issue, his Lease made to him for life, was void, and not voidable ; because by the death of Tenant in tail, his estate, out of which the estate of the Tenant for life was derived, is determined : and therefore the estate for life is determined also ; *Et cessante causa, cessat effectus*. And *Meade* compared it to the Case of 21. H. 7. 12, where it was holden, That if a man do make a Lease for life upon condition, that if he pay unto the Lessee ten pounds at such a day, that his estate shall cease. Now by the performance of the Condition, the estate is determined without entrie.

Mich. 24. Eliz. In the Common Pleas.

13. POLES Case.

THOMAS Pole one of the Clerks of the Chancery, married a woman who was Executrix to her Husband: and in an Action of Debt brought against them in the Common Pleas, the said Pole brought a writ of Priviledg, to have removed the said Action into the Chancery: And by all the Justices the Writ was disallowed, and the defendants ruled to answer there, because the Wife was joyned in the Action with the Husband; and she could not have the priviledg, and therefore not the Husband. And so it is adjudged by the whole Court, 34. H. 6. 29. and 35. H. 6. 3. But see 27. H. 8. 20. where the case was, That a man brought an Action in the Common Pleas against Husband, and at the *pluries* returned, he and his Wife were arrested into an inferior Court *veniendo to Westminster*; and because the Husband hath priviledg, therefore his Wife shall be in the same condition. But *Dyer* said, That the reason there was, because the Wife came in aid of her Husband to follow his suit: And therefore it is not like the principall Case at the Bar.

Mich. 24. Eliz. in the Common Pleas.

14.

IN Debt upon a Bond of Forty pound, for the Payment of Twenty pound at a Day and Place certain: The Defendant pleaded, That he had paid the said Twenty pound, according to the Condition, upon which they are at Issue; and at the *Nisi Prim*, the Defendant gave in Evidence, That he had paid the Money to the Plaintiff before the day, and that the Plaintiff had accepted of it; all which Matter the Jury found specially, and referred the same to the Justices: And it was said by the whole Court, That that payment before the day was a sufficient Discharge of the Bond; but because the Defendant had not pleaded the same Specially, but Generally, that he had paid the Money according to the Condition; the Opinion was, That they must find against the Defendant, for that the Speciall Matter would not prove the Issue: and the Lord *Dyer* Chief Justice said, That the Plaintiffs Councel might have demurred upon the Evidence.

Mich.

Mich. 24. Eliz. in the Common Pleas.

15

AN ACTION was brought upon the Statute of 1 & 2 Phil. & Mar. And the Statute is, That no Distresse shall be driven out of the Rape, Hundred, Wapentake or Laith, where such distresse is, or shall be taken, except it be to the *Pound Overt* within the said County, not exceeding three Miles distant from the place where the Distresse was taken; and the Plaintiff declared of a Distresse taken in a Hundred, in such a County, and that he drove it six miles out of the County; and because a Hundred may be in diverse Counties, and the Statute is, That the driving ought not be more then 3 miles out of the Hundred; and that it might be that the driving was six miles from the place where the Distresse was taken in another County, and yet not three miles from the Hundred where the taking was, for that Cause it was not adjudged against the party; And that was after Verdict, in arrest of Judgment.

Pasch. 24. Eliz. in the Common Pleas.

16.

AFEME sole seized of a Manor to which there were Copyholds. One of the Copyholders did entermarry with the woman, and afterwards he and his wife did suffer a Recovery of the Manor, unto the use of themselves for their lives, and afterwards to the use of the heires of the wife. The Question was, Whether the Copyhold were extinct; And *Anderson* the Chief Justice said, That if a Copyholder will joyn with his Lord in a Feoffment of the Mannor, that thereby the Copyhold is extinct. The same Law is, if a Copyholder do accept a Lease for years of his Copyhold: which was agreed by the whole Court.

Pasc. 24. Eliz. in the Common Pleas.

17.

I. N. Doth Covenant with *I. S.* by Indenture, to pay him forty pounds yearly for one and twenty years, and afterwards *I. S.* doth release to *I. N.* all Actions. The Question was, Whether the whole Covenant were discharged. And it was holden by all the Justices, that only the Arterages were discharged, because the Covenant is executory,

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yearly

yearly to be executed during the Term of one and twenty years, for he may have several Actions of Covenant for every time that it is behind; and if it be behind the second year, he may have a new Action for that, and so of every year during the Term, several Actions: for nothing shall be discharged by the release of all Actions, but that which was in Action, or a Dutie at the time of the release made, As in 5. E. 44. and L. 5. E. 4. 41. In debt for Arrerages of an Annuity; the defendant pleaded a release of all Actions, which bore date before any arrerages were behind; And the opinion of the Justices was there, That it was no Plea, and so it was adjudged; for it is not a thing in Action, nor a Duty, untill the day of payment comes. And it is there holden by *Arden*, That if a man make a Lease for two years rendring Rent, and that the Tenant shall forfeit twenty shillings *nomine pene*, for not payment at the day, there a release of all Actions personals made to the Tenant before the penalty be forfeited, is no Bar; for it is neither Duty, nor thing in Action before the failer of payment. And in 42. E. 3. 33. A man did release, to his Tenant for term of life all his Right for the Term of the life of the same Tenant for life; And that he nor his heirs might any right demand, nor challenge, or claim for the life of the Tenant for life, in the said Land; and afterwards he died, and the Tenant committed Waste, and the heir brought an Action of Waste, and the Tenant pleaded the same Release, and it was holden no Plea, for nothing was extinct by the same Release but that which was in Action at the time of the Release made, and that the Waste was not. *Rhodes* Serjant put a Case, which he vouched to be adjudged. 4. Eliz. which was, That if a man Covenant with *I. S.* that if he will marry his daughter, that then he will pay him twenty pounds; If a Release were made by *I. S.* before the marriage, the same will not determine the twenty pounds if he marry her afterwards, because it was not a Duty before the marriage: So in the principal Case, notwithstanding that the Covenant was once broken for the non-payment at the first day; yet because a several Action of Covenant lieth for every day that it was arreare, the Release shall extinguish but only that which was Arreare at the time of the Release made: And so Note, That a Release doth not discharge a Covenant which is not broken.

Pasch. 24. Eliz. in the Common Pleas.

18.

UPon a special Verdict in an Action of Debt; The Case was this: *I. S.* and *I. N.* did submit themselves to the Award, Order, Rule and Judgement of *A.* and *B.* for all Matters, Quarrels and Debates, and the Bond was made to perform the Award, Order, Rule and Judgement

ment made by them : And they Award, Order , Rule and Adjudge, That *I. S.* shall pay to *W. N.* who was a Stranger, twenty shillings. The first Question was, Whether the Award were good : And it was holden by *Anderson* Chief Justice, *Meade* and *Periam* Justices, That the Award was void, because it was out of their Submission, for they cannot Award a man to do a thing which doth not lye in his power, for in this Case *W. N.* to whom the money is to be paid, is a Stranger, and it is in his Election, if he will accept of the money or not. And so it is holden in 22. *H.* 6.46. and 17. *E.* 4.5. but *vid. cont.* 5. *H.* 7.2. Then if the Award be void, The second Question was, If yet the Bond to performe it be good or not ; And it was holden by the whole Court, that it was void also, against the Book of 22. *H.* 6.46. because that the Condition was to performe that which was against the Law (*Quare* that Case, for it seemes not to be Law at this day.) And it was then holden, That Awards concerning Acts to be performed by them which have not submitted, are void : And in all Cases where each of the parties which submit have not some thing, the Award is void.

Pasch. 24. Eliz. in the Kings Bench.

19.

IN an Action upon the Case upon a Promise, The consideration was, Where *I. S.* had granted a Term to *I. D.* That afterwards upon the request of *I. S.* *I. D.* did make to *W.* an Estate for four years, upon which *W.* brought his Action : And after Verdict it was moved in stay of Judgement, that there was no good consideration, and a difference taken, where the Promise was upon the Grant ; and where afterwards : If it were before, then the Condition was good ; but if it were afterwards, it was not good : And it was adjudged, That the Plaintiffe, *Nihil capiat per billam.*

Pasch. 24. Eliz. in the Kings Bench.

20.

AN Action upon the Case upon a Promise was : The Consideration was, That in consideration that the Plaintiffe *Daret dismissionis*, the Defendant *Super se assumpsit* ; and because he doth not say *in facto*, that he had given day. It was adjudged that no sufficient Consideration was alledged : But if the Consideration were *Quod cum indubitat*, &c. the same had been a good Consideration without any more ; for that implies a Consideration in it self.

Pasch

Pasch. 24. Eliz. in the Kings Bench.

21.

IT was said by *Cooke*, That the Chancellor, or any Judge of any of the Courts of Record at *Westminster*, may bring a Record one to another without a Writ of *Certiorare*, because one Judge is sufficiently known one to the other, as 5. H. 7. 31. where a Certificate was by the Chancellor alone; and to this purpose is 11. H. 4. But that other Judges of base Courts cannot do, nor Justices of the Peace, as 3. H. 6. where the certificate by Suitors was held void.

Pasch. 25. Eliz. In the Common Pleas.

22. SKIPWITH'S CASE.

IT was found upon a speciall verdict in an Action of Trespass, that the place where, &c. was Copy-hold land! And that the Custome is, That *qualibet femina viro cooperta poterit* devise lands whereof she is seised in Fee, according to the custome of the Manor, to her Husband, and surrender it in the presence of the Reeve and six other persons. And that *L. S.* was seised of the land, where, &c. and had issue two Daughters, and died, and that they married husbands; and that one of them devised her part to her husband by Will in writing, in the presence of the Reeve and six other persons: and afterwards at another day shee surrendered to the Husband; and he was admitted; and shee died, and her Husband continued the possession. And the Husband of the other Daughter brought an Action of Trespasse. *Roder Serjeant*, The Custome is not good, neither for the Surrender, nor for the Will, for two causes: One, for the uncertainty of what estate shee might make a Devise, and because it is against reason, that the Wife should surrender to the Husband, Where the Custome shall not be good, if it be uncertain; he vouched 13. E. 3. *Fitz. Dum fuit infra atatem*. 3. The Tenant saith, that the lands are in *Dorset*, where the Custome is, that an Infant may make a Grant or Feoffment, when he can number twelve pence. And it was holden, that because it is uncertain when he can so do, the Custome is not good. 19. B. 2. in a Ravishment of Ward, the defendant pleaded, that the custome is, that when the Infant can measure an ell of cloth, or tell twelve pence, as before, that he should be out of Ward: and it is holden no good custome for the cause aforesaid. 22. H. 6. 5. *et* there a man preferred, That

the

the Lord of D. had used to have Common for him and all his tenants; And because it is not shewed, what Lord; whether the Lord mediate or immediate, it is adjudged no good custome. And as to the Surrender, it is against reason, that the Wife should give to the Husband; for a Wife hath not any Will but the Will of her Husband: For if the Husband seised in the right of his Wife, make a Feoffment in Fee, and the Wife being upon the land, doth disagree unto it, saying, that shee will never depart with it during her life; yet the Feoffment is good, and shall binde during the life of the Husband, as it is holden in 21. E. 3. And therefore it is holden in 3. E. 3. *Tit. Devise, Br. 43.* That a Feme covert cannot devise to her Husband; for that should be the Act of the Husband to convey the land to himself. And in the old *Natura Brevium*, in the Additions of *Ex gravi quærela*, it is holden so accordingly. And the Case in 29. E. 3. differs much from this Case: For there a woman seised of lands devisable, took an Husband, and had issue; and devised the lands to the Husband for his life, and died, and a Writ of Waste was brought against him as Tenant by the Courtesie; and it was holden that it did lie, and that he is not in by the Devise; for the reason there is, because he was in before by the Courtesie: But as I conceive, that Case will disprove the Surrender; for in as much as he had it in the Right of his wife, he could not take it in his own Right. Also he took another Exception in the principal Case, because that the wife was not examined upon the Surrender; but none of the Justices spake to that Exception: but when the Record was viewed, it appeared, that it was so pleaded: Further, He said, That the devise was void by the Statute of 34. H. 8. *Cap. 5.* where it is said, It is enacted, That Wills and Testaments made of any Lands, Tenements, &c. by women Coverts, or &c. shall not be taken to be good, or effectual in Law. And he said, That this Statute doth extend to customary Lands; And as to that all the Justices did agree, That it is not within the Statute. And as to the Statute of Limitations, *Anderson* chief Justice said, That if a Lease for years, which perhaps will not indure sixty years, shall be taken strong, this shall. *Anderson* moved, That if the Lord Lease Copyhold land by Word, Whether the Lessee might maintain an *Ejectione firme*: and he conceived not; for in an *Ejectione firme*, there ought to be a Right in Fact: And although it be by conclusion, it is not sufficient, for that the Jury or Judge are not estopped or concluded: And he conceived, That if Tenant at Will make a Lease for years, that it is no good lease betwixt him and the Lessor; but that he may well plead, that he had nothing in the land: *Meade* contrary; but they both agreed, That the Book of 14. E. 4. which saith, That if Tenant at Will make a lease for years, that he shall be a Disseisor, is not Law. *Anderson* said, That the prescription in the principal Case was not good, for it is *Quod qualibet femina viro cooperta poterit, &c.* and it ought

ought to be, that feme Coverts *possunt*, and by the Custome have used to devise to the husband, and therefore the prescription is not good, that *Potest ponere retes* upon the land of another upon the Custome of the Sea; for prescription must be in a thing done: also by him the devise is not good according to the Custome, for that is, that she may devise and surrender; and that ought to be all at one time, and that in the presence of the *Reeve* and six other persons, as well as the Surrenderer; and the words of a Custome shall be so far performed as they may be. *Meade* contrary: And that these Witnesses shall be referred to the surrender onely, for a devise may be without Witnesses. And he said, that sometimes the latter clause shall not refer to all the precedent matter, but unto the latter onely, as 7.H.7. is, Where a *Præcipe* was brought of lands in *A. B. and C. in Insula de Ely*: the Clause (*in Insula de Ely*) is referred onely to C. And it was said, That if in the principal Case the Will were good, that then the husbands are Tenants in common; and then the Action of Trespass is not maintainable.

Pasch. 25. Eliz. in the Common Pleas.

23.

THIS Case was moved by Serjant *Gawdy*. *Thomas Heigham* had an hundred Acres of lands, called *Jacks*, usually occupied with a house; and he leased the house and forty Acres, parcel of the said hundred Acres, to *I. S.* for life, and reserved the other to himself, and made his Will, by which he doth devise the house and all his lands, called *Jacks*, now in the occupation of *I. S.* to his wife for life; and that after her decease, the remainder of that, and all his other lands pertaining to *Jacks*, to *R.* who was his second son; Whether the wife shall have that of which her husband died seised for her life, or whether the eldest son should have it, and what estate he shall have in it. *Meade*. The wife shall not have it; for, because that he hath expressed his Will that the wife shall have part, it shall not be taken by implication, that she shall have the whole or the other part, for then he would have devised the same to her; And therefore it hath been adjudged in this Court betwixt *Glover* and *Tracy*; That if Lands be devised to one and his heirs males; and if he die without heirs of his body, that then the land shall remain over, that he had no greater estate then to him and his special heirs, *viz.* heirs Males: and the reason was, because the Will took effect by the first words. *Anderson* Chief Justice; It was holden in the time of *Brown*, That if lands were devised to one after the death of his wife, that the wife should have for life: but if a man seised

of

L. Mountjoy and E. of Huntington's Case. 17

of two Acres, deviseth one unto his wife, and that I. S. shall have the other after the death of the wife, she takes nothing in that Acre for the Cause aforesaid. For the second matter, If the Reversion shall pass after the death of the wife to the second son; we are to consider what shall be said land usually occupied with the other, and that is the land leased with it. But this land is not now leased with it, and therefore it cannot pass. *Windham*. The second son shall have the Reversion; for although it doth not pass by these words, Usually Occupied, (as *Anderson* held) yet because the devise cannot take other effect, and it appeareth that his intent was to pass the land, the younger son shall have it. *Anderson*. *Jacks* is the intire name of the house and lands; And that word when it hath reference unto an intire thing called *Jacks*, and is known by the name of *Jacks*, shall pass to the second son; for words are as we shall construe them: And therefore, If a man hath land called *Mannor of Dale*, and he deviseth his *Mannor of Dale* to one, the land shall pass, although it be not a Mannor: And if I be known by the name of *Edward Williamson*, where my name is *Edward Anderson*, and lands are given unto me by the name of *Edward Williamson*; the same is a good name of purchase. And the opinion of the Court was, that the Reversion of the land should pass to the second son.

Pass. 25. Eliz. in the Common Pleas.

24. The Lord MOUNTJOY, and the Earle of HUNTINGTON'S Case.

NOte, by *Anderson* Chief Justice, and *Periam* Justice. If a man seised of any entrie Franchises, as to have goods of Felons within such a Hundred, or Mannor; or goods of Outlaws, Waifes, Strates, &c. which are casual; These are not Inheritances deviseable by the Statute of 32. H. 8. for they are not of any yearly value, and peradventure no profit shall be to the Lord for three or four years, or perhaps for a longer time. And such a thing which is deviseable ought to be of annual value, as appeareth by the words of the Statute. And also they agreed, that the said Franchises could not be divided; and therefore if they descend to two coparceners, no partition can be made of them. And the words of the Statute of 32. H. 8. are, That it shall be lawful, &c. to divide two parts, &c. and then a thing which cannot be divided, is not deviseable. And they said, That if a man had three Manors, and in each of the three such Liberties, and every Manor is of equal value, that yet he cannot devise one Mannor and the Liberties which he hath to it, *Causâ quâ supra*: but by them an Advowson is deviseable, because it may be of annuall

annual value. But the Lord Chancellor, smiling, said, That the Case of the three Manors may be doubted. And there also it was agreed by the said two Justices, upon Conference had with the other Justices, That where the Lord Mountjoy by deed, Indented and Inrolled, did bargain and sell the Manor of Camford to Brown in Fee; and in the Indenture this Clause is contained, Provided alwayes, And the said Brown Covenants, and Grants to, and with the Lord Mountjoy, his Heirs and Assigns, that the Lord Mountjoy his Heirs and Assigns, may digg for Ore within the land in Camford, which was a great Waste; and also to digg Turffe there to make Allome and Cooperess, without any contradiction of the said Brown, his Heirs and Assigns. They agreed, That the Lord Mountjoy could not devide the said Interest, *viz.* to grant to one to digg within a parcel of the said Waste. And they also agreed, That notwithstanding that Grant, That Brown, his Heirs and Assigns, owners of the Soile, might digg there also, like to the Case of Common Sans number. The Case went further, That the Lord Mountjoy had devised this Interest to one Laicott for one and twenty years, and that Laicott assigned the same over to two other men: And whether this Assignment were good or not, was the Question; forasmuch that if the Assignment might be good to them, it might be to twenty; and that might be a surcharge to the Tenant of the soile. And as to that the Justices did agree, that the assignment was good; but that the two assignees could not work severally, but together with one stock, or such workmen as belonged to them both. And Cook, who reported the opinions of the Justices, was of Counsel with the Lord Mountjoy. And note, in that case it was said, That Proviso being coupled with other words of covenant and grant, doth not create a Condition; but shall be of the same nature as the other words with which it is coupled.

Pasch. 25. Eliz. In the Common Pleas.

25. WEBBE and POTTER'S Case.

In an *Ejectione firme* the Case was this:

John Harris gave Land in Frankmarriage to one White: And the words of the Deed were, *Dedi & concessi* I. W. *in liberum maritagium* Joannæ filia sua, *Habendum eidem* J. W. *& heredibus suis in perpetuum, tenendum de Capitalibus Dominis fiodi, &c.* with warranty to the Husband and his heirs. *Periam* Justice, although the usuall words of gift in Frankmarriage are not observed; yet the Frankmarriage shall not be destroyed (for the usuall words are, *In liberum maritagium cum* Joannæ filia mea; in the ablative case): And it was holden by all the Justices,

stices, that notwithstanding that, the Frankmarriage was good. Also a gift in Frankmarriage after the espousals, is good, as it was holden by all the Justices. And see *Fitz. Tir. Taile* 4. E. 3. and 2. H. 3. *Dower* 199. And he said, That a gift in Frankmarriage before the Stat. of *Donis*, &c. was a Feeimple, but now it is but a special tail: and if it should not be in law a gift in Frankmarriage, then the Husband and Wife have an estate but for their lives; for they cannot have an estate taile, for that there are not words of limitation of such estate in the gift. And hee cited 4. E. 3. and 45. E. 3. 20. to prove his opinion: and hee much relyed upon the intent of the Donor, which ought to be observed in construction of such Gifts according to the Statute. And because the *Habundum* is repugnant to the premisses, and would destroy the Frankmarriage, it is void, and the premisses shall stand good: and to prove that, he cited 9. E. 3. 13. E. 1. 32. E. 1. *Tir. Taile* 25. 3. H. 4. by *Hill*. And he took this difference; Where a Remainder is limited upon a Gift in Frankmarriage to a stranger, and where it is limited to one of the Donees; for in the first case, the Remainder is good for the benefit of the stranger; but in the second case it is void. And he said, that if a Rent be reserved upon such a Gift, that it should be void during the four degrees, but afterwards the Reservation should be good. And if the Donor grant the Reversion over, and the Donee in Frankmarriage attourn, now he shall pay rent to the Grantee; for by *Litleton*, he hath lost the Priviledge of Frankmarriage, viz. the Aquitall; and no privitie is betwixt the Grantee and the Donees. 10. *Aff*. 26. & 4. H. 6. That it is not any taile, if it be not Frankmarriage. *Windham* Justice: Although it be no estate in Frankmarriage, yet it is an estate taile: and he cited 8. E. 3. although there want the word *Heirs*. Also if a man give lands to another & *semini suo*, it is good; 45. E. 3. *Statham, taile*. If it be not Frankmarriage, yet it is a good estate in taile. 19. *Aff*. Land was given to Husband and Wife in Frankmarriage, *infra annos nobiles*, and afterwards they are divorced; the Wife hath an estate in taile. *Meads* Justice did agree with *Windham*, and said, That although there be not any Tenure, nor any Aquitall, yet it may be a good Frankmarriage; as if a Rent, Compton, or Reversion be given in Frankmarriage, it is good; and yet there is not any Tenure nor aquitall. *Dyer* Chief Justice conceived, That it is not Frankmarriage; because that the usuall words in such Gifts are not observed: for he said, that the gift ought to be *in liberum Maritagium*, and not *fratru filia sue*; for that is not the usuall form of the words: And he said, That if the word [*Liberum*] be omitted, that it is not Frankmarriage; for that he said, is as it were a Maxime: and therefore the usuall words ought to be observed. And by the same reason such a Gift cannot be with a man, but ought to be with a woman: also such a Gift ought to be with one of the blood of the

Donor, who by possibilitie might be his Heir. Also there ought to be a Tenure betwixt the Donor and Donee, and also an Aquitall. And if these grounds and ceremonies be not observed, it is not Frankmarriage. Also if it once take effect as a Frankmarriage, and afterwards the Donor granteth the Reversion over, or if the Reversion doth descend to the Donees, yet it shall not be utterly destroyed, but shall remaine as an estate taile, and not as an estate for life; because it once took effect in the Donees and their issues as a Frankmarriage, 31. E. 1. taile 116. If a man give lands in Frankmarriage, the remainder to the Donees and the heirs of their bodies; yet it is a good Frankmarriage. And if a man give Lands in Frankmarriage, the Remainder to another in taile, it shall not destroy the Frankmarriage, because that the Donor hath the Reversion in Fee in himself, and the Donees shall hold of him, and not of him in the Remainder in taile; but if the Remainder had been limited to another in Fee simple, then it had been otherwise. Also if the Donor grant the Services of the Donees in Frankmarriage, reserving the Reversion to himself, it is no good Grant, although that the Donees attourne; for that the Services are incident to the Reversion: but if he grant the Reversion, then they do passe. And he concluded, That the Husband had the whole, and that the Wife had nothing: for she was no purchaser of the premises, because that the Gift did not take effect as a gift in Frankmarriage: And he said, that he doth not construe it so by the intent of the Gift; for here is an expresse limitation of the Fee to the Husband and his heirs, which shall not be contradicted by any intendment; for an Intendment ought to give way to an expresse Limitation, as a consideration implied ought to give place to a consideration expressed. And afterwards this yeer it was adjudged, that it was not a Frankmarriage, nor a Gift in taile, but that it was a Fee simple. And the Justices said, that although the old books are, That where it takes not effect as a Frankmarriage, that yet it shall take effect as an estate taile, those Books are against Law. But they agreed, That where once the Gift doth take effect as a Frankmarriage, that by matter *ex post facto*, it might be turned to an estate in taile.

Pasch. 26 Eliz. In the Common Pleas.

26.

Mede and Windham (the other Justices being absent) were of opinion, That a Copyholder in Fee, who by the Custome might surrender in Fee, might make a surrender in taile, without any speciall custome so to doe: and he who may prescribe to make a Feoffment in.

in Fee, might make a Lease for life, and it should be good, *quia omne majus continet in se minus.*

Pasch. 26 Eliz. In Communi Banco.

27

IN a Writ of Dower, the Defendant made her demand *de tertia parte libera falde*: and Serjeant Gandy moved if it were good, without setting in certain for what cattell: And it was held not good; for if it be not of a certain number, she shall not be thereof endowed, no more then of a Common uncertain. And if she do demand Common which is certain, yet she shall not be endowed, if she do not shew the certainty of it. Windham said, That if the Common be uncertain, that the woman shall be allowed for it: But Meade said, He doth not know how the allowance shall be made.

Pasch. 25 Eliz. In the Exchequer Chamber.

28

IT was holden in the Exchequer Chamber, before the Treasurer and the Barons, in the case of one Pelham, That whereas the Queen had granted to him by Letters Patents, That he should not be Bailiff, Constable, nor other Officer or Minister, *licet eligatur*: That if the Queen make him Sheriff of a County, that he shall not be discharged by that Patent, for that such Offices do not extend to Royal Offices: as a grant of Amerciaments shall not extend to Amerciaments Royal. And also the making of a Sheriff is not by election, but onely by denomination of the Queen. So that if he have not these words besides (*licet eligatur per Nos*) he shall be Sheriff. And that they said was also the opinion of Bromley Lord Chancellour.

Mich. 26 Eliz. In the King's Bench.

29

IT was holden by the Court, That if a man binde himself to performe the last Will of *I. S.* and he is made Executor, that hee is bounden to pay Legacies without any demands. *Vide 11. E. 4. 10. a. 14. E. 4. 4. a. 20. E. 4. 28.* Yet it was said, That Pasch. 25. Eliz. they put a difference

serence, where a man is bound to perform the last Will, and when to perform the Legacies; for in the later case the Law is *ut supra*.

Hill. 26 Eliz. In the Common Pleas.

30.

IF I be bound, that my Lessee shall take, reap, and carry his Corn peaceably without interruption: and afterward in Harvest, when he is reaping, I come upon the land; and say to him, that he shall not reap any corn there; but otherwise I do not disturb him: The opinion of all the Justices was, that for these words spoken by me upon the Land, that I have forfeited my Bond. And yet it was urged by Serjeant *Puckering*, That I was bound to suffer him to do three things, *scil.* to take, to reap, and to carry, and all these things he hath done. See the Case 47.E.3.22. where the saying to a Tenant by one Coparcener, that he ought not to pay any thing to the other, was a Disseisin.

Pasch. 26. Eliz. in the Common Pleas.

31

A Man was bound in a Recognizance for his good behaviour: and it was shewed, that he was arrested for suspicion of Felony by a Constable, and that he escaped from him; to which he pleaded, Not guilty: Exception was taken, because it was not shewed that a Felony was committed, which might cause suspicion, for that is traversable: and *per Curiam* it need not; for although no such felony was committed, and although the arrest were tortious, yet the Recognizor had forfeited his Recognizance, by making an escape, which is a Misbehaviour.

Pasch. 26 Eliz. In the Common Pleas.

32 BUSHEY'S Case.

P*aul Bushey* Vicar of *Pancras* leased his Vicarage to Doctor *Clark*, the Glebe land, and the Church, and all things to the same belonging (Excepting the housing) reserving twenty pound rent yearly, at *Lammas*, and *Sancti Petri advincula*, by equall portions: and if the

Rent

Rent be behinde by the space of a month, that then it should be lawfull for the Vicar to distrein : And the Lessee was bound to perform all Covenants, Articles and Agreements contained or recited within the same Indenture. And for rent not paid the 29 of *August 25. Eliz.* the Vicar brought Debt upon the Bond : To which the Defendant pleaded, That the Rent was not demanded the 29 day of *August* : upon which they were at issue : and the Jury being ready at the Bar, *Walmeley* said, That the Enquest ought not to be taken for three causes : First, He hath made a lease of the Vicarage except the housing, and the Plaintiff hath alledged the demand to be generall *super terris glebalis*, and hath not shewed where. To that the Justices said, It had been better to have said, At such a gate, or hedge, or high-way ; but notwithstanding they did not allow of that Exception ; for if it were not well demanded, it ought to be shewed of the other side. The second exception was, because the Enquest were all *de Vicineto de Pancras*, and it might be that some of the Lands appertaining to the Vicarage did extend to *Islington* : but that Exception was disallowed also. The third Exception was, because that the *Venire facias* did not well recite the Issue, for the exception of the housing was left out : and *per Curiam*, it is not needfull that all be recited : But if another issue then that upon which they were at issue had been recited, it had not been good. And afterwards the Enquest was taken, and found for the Plaintiff. But nothing was spoken, whether there needed any demand in such case, or not.

Pasch. 26 Eliz. In the Common Pleas.

33

IF a man be presented unto a Benefice, which is not above the value of six pound *per annum*, and afterwards he is presented unto another of twenty pounds ; and afterwards is deprived for cause of Plurality : The Ordinary must give notice to the Patron ; for that is at the common Law : and untill Deprivation it is no Cession.

Trinity 26 Elizab. In the Common Pleas.

34 THROGMORTON and TERRINGHAM's Case.

IN a Replevin, the Defendant did avow the taking of the cattell, by reason that one *A.* held of him an Acre of land in the place where,
 &c.

&c. by fealty, and sixteen shillings rent, the rent payable at two Feasts of the year, &c. And the Plaintiffe said, that he held the same acre, and two others of the Avowant by fealty, and sixteen shillings payable at one day, *absq; hoc* that he held the said acre by the services payable at two dayes, &c. *Snagg*. The tenure cannot be traversed: and 21 E. 4. the last case is the same case; where the Avowry is made for 12 pence at four days; and the Plaintiff said, that he held by twelve pence payable at one day, without that that he held by the Services payable at four dayes. And there it is holden, that the same cannot be an Encroachment, because they agree in the Services. *Walmesley*. He shall have the traverse for the mischief which otherwise would follow: for if he should traverse the seisin, thereby he should confesse the Tenure. *Periam concessit*, and said, That the difference which is commonly taken in our Books, is, That where they agree in the Tenure, there the Seisin is traversable; but where they do not agree in the Tenure, there the Tenure is traversable. So is 26. H. 8. 6. 7. E. 4. 27. 12. E. 4. 7. 20. E. 4. 16. And he conceived here, that the payment at two dayes doth alter the tenure; so as now it is another tenure then before. Also he said, That if Wh. acre and Bl. acre be adjoining, and are holden the one of I. S. and the other of I. D. and I. S. distrein and avow for both acres, that he may well traverse the tenure. *Meade* 8. H. 7. 5. 4. It is said by *Brian*, That if avowry be made for a tenure of two acres by twenty shillings, and the Plaintiffe saith, that he holdeth these two and two other acres by twelve shillings, without that, that he holdeth the two acres by twenty shillings: that that is good, for that he cannot do otherwise. And it is no reason, that for a false avowry, the Plaintiffe should be at a mischief. But the Book is not ruled, for *Keble* is contrary. *Vide Librum*.

Trinit. 26 Eliz. in the Kings Bench.

35 SAVELL and CORDELL's Case.

HENRY Savell Lessee for years of the Manor of M. grants the same Manor, *Habendum* for so many years, which should be to come after his death, to *Cordell* Master of the Rolls, if *Dorothy* his Wife so long should live: And afterward *Henry Savell*, and he in the Reversion levied a Fine. The Case went by many Conveyances further. But two points were here moved: 1. If it were a good Grant for so many yeers, &c. *Shuttleworth* argued that it was. But *Cooke* contrary. And *Cooke* said to that which hath been said, That Leases which have uncertain beginning, may be by act of matter *ex post facto*, made certain, and so good

good. As a lease for so many years as *I. S.* shall name; if he name, it is a certain lease: but if the Lessor die before *I. S.* name, and after hee name, all is void, as it is in the Commentaries put by *Weston*, and granted by *Dyer*, 273. And the reason is, that it behoves that the interest passe out of the Lessor during his life, and the Deed ought to have its perfection in the life of the Lessor. But in our case here, the Lessor or Grantor is dead before the certaintie of the beginning is known, and before any perfection of interest out of him: and therefore the reason in the common case, 40 *Aff.* and 16. *E.* 3. that there behoveth to be Attornment in the life of the Lessor, proves our case: for the reason of that is, that it behoveth that some interest passe out of the Lessor or Grantor during his life; and that perfection of his Grant be in his life, or else the Grant is void. *Vide* 31. *E.* 3. *alb.* 20. and 33. *E.* 3: *Confirmation* 22. If the Chapter confirm the Grant of the Bishop after his death, it is void; for it ought to have perfection in the life of the Bishop, otherwise it is void. And upon that reason is the case put by *Popham*, *Com.* 520. *b.* That where a man grants all his term which shall be to come after his death; that it is a void Grant, because no interest passeth during the life of the Grantor. And to this purpose is 7. *E.* 6. *Br. Leases.* 66. *Temps. H.* 8. 339. If a man will take by Livery within the view, it behoves the Feoffee to enter during the life of the Feoffor: and yet that is a more strong case; for by the Livery, being a ceremony of the Law, it is presumed that the land passed; and yet there ought to be an entry to fortifie the Grant, otherwise it is void. The second point was, If by the Fine levied, the possibility as well as the right of possession of the term did passe: And I conceive, that it doth; therefore we see in many cases, a man may grant by his Deed a possibility to come. As 19. *H.* 7. 1. where a man seised in the right of his Wife, made a Feoffment in fee, and after they had issue, and the Wife died; that he should not be Tenant by the Courtesie, and yet the Wife was remitted: but by his own Grant he had granted from him the possibility he might have had to be Tenant by the courtesie. And here, If *Cordell* had entered, and made a Feoffment in fee, or levied a Fine, the possibility which he had to have the term, had been cleerly gone. 39. *H.* 6. 43. If I disseise my Father, and make a Feoffment in fee, and afterwards my Father dieth; although that a new Right descends unto me, yet I shall be barred of this possibilitie which I had at the time of the Grant: But otherwise it had been, if this discontinuance or grant had been defeated by entry or otherwise, in my life, by my Father or any other; in that case I may shew the speciall matter, as 15. *E.* 4. 5. is, and so avoid my own Deed. And 44. *E.* 3. 4. is, That tenant for years and he in the Reversion disclaim, and it is holden a good Disclaimer; which proves, that a possibility may also pass by Disclaimer. And 21. *E.* 3. and 35. *H.* 6. is, That if he who hath cause to have a Writ of Error, if

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he enter into the Land, and make a Peoffment, the Writ of Error is gon for ever; so by these Cases it is proved, and appeareth, That a Possibility may passe by grant: And so in the Principall Case, the Possibility to have the terme, is by this Fine granted; and the Grant is a good Grant, And it was adjourned.

Pasch. 26. Eliz. in the Kings Bench.

36. LUDDINGTON and AMNER'S CASE.

Intratur Mich. 25. Eliz. Rot. 493.

There is no word of a lease for years, that is in the edition of Ch. Dunnington in 1661

IN a Writ of Error, the Case was this; *Perepoynt* possessed of a Lease for 99 years, devised the same unto his Wife for Life; and that after her Decease, that it should go to his Children unpreferred; the Wife took Sir *Thomas Fulster* to her Husband, and the Lease was put in Execution by *Fiery facias* for the Debt of Sir *Thomas Fulster*, and afterwards Sir *Thomas* died, and the Wife died: The Administrators of Sir *Thomas Fulster* did reverse the Judgement, upon which the Lease was taken in Execution: And afterwards *A.* the Daughter of *Perepoynt* entred, supposing her selfe to be the only Daughter of *Perepoynt* alive, unpreferred by her Father in his life time. And the Pleading was, That the Wife of *Perepoynt* was his Executrix, and that she entred into the Lease after the death of *Perepoynt*, *Virtute legationis & donationis pradiſt.* Cook. There is a difference in our Books, That the Devise of the Occupation of a Term, may be with the Remainder over, but not a Devise of the Term with the Remainder over. And the Devisee of the Occupation of a Term hath one speciall Property, and the Remainder another Property: As if a Lease be extended upon a Statute, the Conusee during the Extent hath one Property, and he who is to have it afterwards, another Property, and the reason of the difference is apparent, when the Occupation is devised, and when the terme is devised; for in the first Case, he puts but only a confidence in the Devisee, as it appears in *Welkdens* Case. But in the other Case all the Property goes, and there is no confidence reposed in the Devisee. And there is a Case in the very Point, with which I was of Councell, and was decreed in the Court of Chancery; it was one *Edolf's* Case; Where the Devise was of a terme, the Remainder to another, and he made the Devisee his Executor, and he entred *Virtute donationis*, as in this Case; and it was decreed, That the Executor might alien the Terme, and that the Remainder could not be good: And to this purpose, *Vid. 33. H. 8. 2 E. 6. 37 H. 6. 30.* But if there might be a Remainder, yet *Incerta Persona nulla donatio*, for if all the Children be preferred

preferred, then the Remainder is void; and then the Property of the Lease is in the Wife; and she might preferre her at any time during her life, and the generall property cannot be in another, but in the Executor, for the Legatee cannot enter, although that 27 H.6. seemeth to be contrary. And if the whole Property be in the Wife, her Husband might alien it, and therefore it may be extended for his Debt, as 7 H.6.1. is. But it may bee objected, That the Cafes before put, are of a devise of a Term, and this is of a Lease. That makes no difference, for in *Wroteley's Case*, Lease there is said to contain, not only a terme, but also the years to come in the terme. Then the Question is, If by the sale of the Sheriff upon the *Fieri facias*, if the term be so gone, that the Wife shall not have it by the Reversall of the Judgment by Error? for the Judgement is, that the Party shall be restored to all that which he hath lost: It is very cleer that it shall never return, for if it should be so, then no sale made by the Sheriffe might be good, unlesse the Judgement be without Error, which would be a very great damage to the Common Wealth. And also by reason, and by the Judgment in the Writ of Error it should not be so restored, for the Judgment is, That he shall be restored to all that which he hath lost, *ratione iudicii*; and here the Defendant hath not lost any thing by force of the Judgment, but by force of the Execution: For the Judgment was to have Execution of 200 li. and of the 200 li. he shall be restored again, and not of the Lease: And therefore in 7. H. 7. If a Manor be recovered, and the Villains of the Manor purchase Lands, and afterwards the Judgment is reversed by Error, the Recoveror shall have the Perquisite, and the other shall not be restored to it: And 7. H. 7. A Statute was delivered in *Owell maine*, and a recovery was by the Conufee upon Garnishment of the Conufor, and the Conufee had Execution; and afterwards the Judgement is reversed by Error; yet the Conufor shall not be restored to the Land taken in Execution, but only the Statute shall be redelivered back where it was before: And in this Case if the party should be restored to the term, it should be great inconvenience. Also if I give one an Authority upon Condition, and the Party doth execute the Authority, and after the Condition is broken, the Act is lawfull by him who had Authority upon Condition. And so was the Lord of *Arundels Case*, where the Feoffee upon Condition of a Manor, granted Coppies; it was holden, That the Grants made by him were good, notwithstanding the Condition was afterwards broken. And in 13 E.3. *Barr* 253. That a Recovery was Erroneous, and the Party being in Execution, the Gaoler suffered him to escape, and after the Recovery was reversed for Error, yet the Action lay against the Gaoler. Also by him, the Jury have given an imperfect Verdict, so as we cannot tell whether the Party were preferred or not, for the Will was (unpreferred generally) and the Jury find that she, viz. A. the daughter, was not

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preferred by her father in his life time, so as the Preferment by the taile is limited generally; so as if any other prefer her, she shall not have the Remainder. And the Jury have found, that she was not preferred by one certain, viz. by her Father; nor in a certain time, in his life time; which is as much as to say, That she was preferred by the Uncle, Aunt or Mother; and if it were so, then the Remainder is not good to her. Also they find no preferment in the life of the father, and it may be that the Father hath given her preferment by Will, and that was no preferment in his life, but is consummate only by his death; and so she might be preferred by him by Implication, by his Will. So as upon the whole Matter, I conceive, That the Judgement ought to be reversed. Note, that this Case was afterwards adjudged at *Hertford Terme*; and the Judgement was, That the Issue of the Wife had Judgement for her Terme; and that the Judgement upon which the Execution was, was Erroneous, and reversed by the Writ of Error; and that the opinion of the Justices was, That the Term was not to be restored, but so much for which it was sold upon the Execution. And the Daughter of *Perepoynt* brought an Action for it, and had Judgement.

*Suppos- the issue not found but dilivered by the sheriff to the receiver
quon, what shall be restored,*

27 Eliz. in the Common Pleas.

37.

ONE had certain Minerall Lands Leased to him for years, with liberty to dig, and make his Profit of the Mine. The Lessee afterwards digged for Mine, and sold the Gravell which came of it: And by the Opinion of the whole Court, This sale was no Waste, for no Sale is Waste, if the first act be not Waste: As the Sale of Trees by Tenant for Life or Years is not waste, if the Cutting and Felling down of them was not Waste before, for the Vendition is but a secondary Act, and but subsequent to the Act precedent; which Act, if it were lawfull, the Sale also is lawfull, for the Sale alone is not waste. But they said, That if the Lessee fell or cut Timber Trees, and sell them, it is waste, *Non quia vendebar, sed quia scindebar*; For if he suffer them to be upon the ground, without doing any thing with them; yet it is waste; but he may use them for the Reparation of his house, and then it is no waste: And yet when he fells them with an intent for Reparations, and afterwards sells them, it is waste, *Non propter Venditionem* only, but for the felling; for by this Act done, it is plaine from the beginning to be unlawfull, for the Sale is only a Declaration of his ill intent, and a means that his meaning was, by felling of the trees, to benefit himself by the hurt and injury of another. But in the Principall Case, because

cause he ought to digge the Land, and that was lawfull for him to do, the Act subsequent cannot be unlawfull: And so it was adjudged.

27. *Eliz. in the Common Pleas.*

38. *MACROWE'S Case.*

M*Acrowe* brought Debt upon a Bond which was endorced upon Condition to pay a lesse sum: The Defendant pleaded the Statute of 13. *Eliz.* That all Covenants, Contracts and Bonds, made for the enjoying of Leases made of Spirituall Livings, by Parsons, &c. were void; And averred, that that Bond was made for enjoying of such a Lease: But because the Condition expressed of the Bond, was for payment of monie, The Justices held it cleer for Law, That the Bond was good, and out of the Statute: And so it was adjudged.

27. *Eliz. in the Common Pleas*

39. *KITTELY'S Case.*

AN Action of Debt was brought against *Eustace Kittley*, and *Charles Kittley*, Executors of the Will of *Francis Kittley*: The Defendants pleaded, That they had fully Administred; and upon a speciall Verdict the Case was this, *Francis Kittley* made the Defendants his Executors, who being within age, Administration was committed unto another untill they came of full age; and after they were of full age, the Jury found, That in the hands of the Administrator *Fuerunt bona & debita Testatoris*, to the value of 4000. ^{li}. To which Administrator the Defendants Executors did release at their full age all Demands; the which Release, whether it were Assets in the hands of the Executors or not, the Jurours prayed the Opinion of the Court. *Puckering* the Queens Sergeant; It is not Assets, for a Release of a thing which is not Assets in the hand of an Executor cannot be said Assets, and things in Action before they come in Possession, cannot be said Assets: But a Gift of Goods in Possession is Assets, and a *Devastavii* of the Goods of the dead. Also there is a difference betwixt a certain thing released and a thing uncertain; of a certain it is Assets, for by such means he hath given such a thing which is Assets; but contrary, of an uncertain. And this Difference is proved by 13. *E. 3. Execut. 91.* where it is holden,

pen, That if Executors release to the Debtor, he shall account for such Sum before the Ordinary; by *Parne*. But *Trew*, He shall not account: But the whole Court was against *Puckering*. And first *Anderson*, It is a cleer Case, That this Release is Assets, for he hath thereby given away that which might have been Assets: And the Law doth intend, That when he releases, that he hath Recompence and Satisfaction from the Party to whom the release is made: And he denyed the Difference of certain and uncertain, put by *Puckering*; and be it in Account or Trespasse, a Release is Assets. And it is not requisite that every Assets be a thing in Possession, or in the hands of the Testator; for a thing may be Assets, which never was in the Testators hands, if those things come in Lieu of the thing which was in the hands of the Testator, as Money for Land or other Goods sold: Or if they came by reason of another thing which was in the hands of the Testator, as increase of Goods by the Executors in their hands, by Merchandizing with the Goods of the Testator, or Goods purchased by the Villain of the Testator after his death, shall be Assets. So money received by the Executor of the Bailiffe of the Testator after his death, shall be said Assets. *Windham* Justice, So it is, if the Testator have Sheep, Swine, or Cowes, and dieth, and they have young Lambs, Pigs, or Calves, they are Assets for the reason aforesaid: And he agreed, that the Release is Assets; and he said, It had been so here adjudged, and he denyed also the difference taken by *Puckering*. *Periam* agreed with the rest in all, and also denyed the difference: And by him, Things in Action or Possession certain or uncertain, if they be released, they are Assets: And he said, That the uncertainty must be such, that the same cannot be proved to the Court, or unto a Jury; that the thing released might not by Possibility have been Assets. For if Trespasse be done to the Testator by taking his goods and he dieth, and the Executors release all Actions, the same is Assets, because it might be proved to the Jury, That had they not released, but had brought their Action of Trespasse, *De bonis a portatis in vita testatoris, &c.* that they might have recovered Damages, which would have satisfied the Debts or Legacies of the Testator, and therefore it shall be Assets: And yet the thing recovered was not in the Testator, or a thing in Possession, or certain in the hands of the Executors; with whom *Rodes* agreed. And *Periam* conceived, That such Administrators made *Durante minori aetate* of the Executor, could not by our Law, neither Sue nor be Sued; For, as he conceived, the Infant was the Executor, and an Infant Executor may either Sue or be Sued, and may release if there be a sufficient Consideration given him: and therefore Administration for such defect is but idle: Wherefore, he said, That if an Infant doth release where he hath no cause, nor good consideration, he shall be answerable of his own goods, when he cometh of full age, for the wasting of
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the estate ; and such Release shall be Assets : And it was holden, That a Release before probate of the Will, is good : and it is Assets also. And the same Term Judgment was given, that the Release of the Infant Executor was Assets.

27. Eliz. In the Common Pleas.

40. SYDENHAM and WORLINGTON's Case.

SYDENHAM brought an Action upon the Case upon an *Assumpsit* against *Worlington* for 30^{li}, and alledged for Consideration, that he, at the request of the Defendant, was Surety and Bail for *J. S.* who was arrested into the Kings Bench upon an Action of 30^{li}, and that afterwards, for the default of *J. S.* he was constrained to pay the said 30 pounds. After which, the Defendant meeting with the Plaintiff, promised him for the same consideration, that he would repay that 30 pound : upon which promise and consideration, the Plaintiff brought this Action. *Walmesley*. This Consideration will not maintain this Action, because the consideration and the promise did not concur and go together ; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration. As if one give to me an Horse, and a month after I promise him for the said Horse ten pounds ; for that he shall neither have Debt nor Assumpsit, for it is neither a Contract nor a sufficient Consideration, because it is executed. *Anderson*. The Action will not lie, for it is but *nudum pactum* because the supposed contract was determined, and not in *esse* at the time of the promise. But he said it was otherwise upon a consideration of Marriage, for that is always a present consideration, and always a consideration, because the party is always married. *Windham* to the same intent ; and compared it to the Case of *5. H. 7.* If one sell an horse to another, and after at another day will warrant him to be good and sound of limb and member, it is void warranty ; for it ought to have been at the same time that the horse was sold. *Periam* Justice contrary : for he said, This case is not like to any of the cases which have been put ; because there is a great difference betwixt Contracts and this Action ; For in Contracts, the consideration, and promise, and sale ought to concur, because a Contract is derived of *con & trahere*, which is a drawing together : so as in Contracts every thing requisite ought to concur ; as the consideration of the one side, and the promise or sale of the other side. But to maintain an Assumpsit, it is not requisite, for it is sufficient if there be any moving cause or consideration precedent, for which cause or consideration the promise

mise was made; and that is the common practice at this day: For in Assumpfit, the Declaration is, That the Defendant, for and in consideration of ten pounds to him paid (*postea, scilicet,*) a day or two after, *super se assumpfit, &c.* and that is good; and yet there the consideration is executed. And he said, that *Hunt* and *Baker's* case (which see 10. *Eliz. Dyer* 272.) would prove it. The case was this: The Apprentice of *Hunt* was arrested when *Hunt* was in the Country; and *Baker* one of *Hunt's* neighbours, to keep the Apprentice out of the Counter, became his Baile, and paid the debt. Afterwards *Hunt* returning out of the Country, thanked *Baker* for his neighbourly part, and promised him to repay him the said sum: Upon which *Baker* brought an Action upon the Case upon the promise: And it was adjudged that the Action would not lie; not because the consideration was precedent to the promise, but because it was executed and determined long before. But there the Justices held, That if *Hunt* had requested *Baker* to have been surety, or to pay the debt, and upon that request *Baker* paid the debt, and afterwards *Hunt* promiseth for that consideration, the same is good; for the consideration precedes, and was at the instance and request of the Defendant. So here, *Sydenham* became bail at the request of the Defendant, and therefore it is reason, that if he be at losse by his request, that he ought to satistie him. And he conceived the Law to be cleer, that it was a good consideration, and that the request is a great help in the Case. *Rodes* Justice agreed with *Periam*, for the same reasons, and denyed the Case put by *Anderson*. And he said, That if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him ten pounds for his good and faithfull service ended; he may maintain an Assumpfit, for it is a good consideration: But if the servant hath wages given him, and the Master, *ex abundantia*, as he said, promiseth him ten pounds after his service ended, the same promise shall not maintain an Assumpfit; for there is not any new cause or consideration preceding the Assumpfit. And *Periam* agreed to that difference, and it was not denyed by the other Justices: but they said that the principall Case was a good case to be adviſed upon; and at length, after good advice and deliberation had of the cause, they gave Judgment for the Plaintiff, that the Action would lie. And note, That they very much relied upon *Hunt* and *Baker's* Case before cited. See *Hunt* and *Baker's* Case in 10. *Eliz. Dyer* 272.

Pas. 27. Eliz. in the Common Pleas.

41 CARTER and CROST's Case.

Carter brought an Action of Detinue of a chaine against *Crost*, and declared, That *Thomas Carter* his brother, was thereof possessed, and died Intestate; for which cause the Bishop of *Cork* granted him Letters of Administration; and that the Chain came to the Defendants hands by *Trover*, &c. And declared also, That he was as Administrator thereof, possessed in *London*: To which the Defendant *Crost* pleaded the Generall Issue; and the Jury gave a speciall Verdict, and found that the Administration was committed to *Carter* in *London* by the Bishop of *Cork* in *Ireland* here, and did not find that *Carter* was possessed of the chain in *London*. And upon this special Verdict, first it was moved, That the Bishop of *Cork* in *Ireland*, being in *England*, might commit administration of things in *Ireland*; And it was held cleerly by the Court, That he might of things within his Diocesse in *Ireland*, because it is an Authority, Power, or Matter that followes his Person; and wheresoever his Person is, there is his Authority: As the Bishop of *London* may commit Administration, being at *York*; but it ought to be alwaies of things within his Diocesse; and therefore they held, That the Declaration was good in that point, That the Bishop of *Cork* did commit Administration in *London*, although there be no such Bishop of *England*. The second point was, If an Administrator made by a Bishop of *Ireland*, might bring an Action here as Administrator; and it was holden, That he could not, because of the Letters of the Administration granted in *Ireland*, there could be no triall here in *England*; although that *Rodes* Justice said, That Acts done in Spirituall Courts in Forrain places, as at *Rome*, or elsewhere, the Law saith, That a Jury may take notice of them; because such Courts, and the Spirituall Courts here, make but one Court; and he proved it by the Case of the *Miscreancy* in *5. R. 2. Tryall 54.* where a *Quare Impedit* was brought by the King against the Clerk of a Church, within the Bishoprick of *Durham*, and counted that the Bishop who is dead, presented his Clerk, and that the Clerk died, and the Chapter collated a Cardinall, who for Miscreancy and Schisme, was deprived, the Temporalities being in the Kings hands. *Bu gb.* He hath counted of an Avoidance for Miscreancy at the Court of *Rome*, which thing is not tryable here. *Belknap* Chief Justice, I say for certain, That this Court shall have Conusans of the Plea, and that I will prove by Reason; for all Spirituall Courts are but one Court; and if a man in the Arches, be deprived for a Crime, and appeal to *Rome*, and is also there deprived, that Depriva-

vation is triable in the Kings Court, in the Arches. And if a man be adhering unto the Kings enemies in *France*, his Lands are forfeitable, and his adherence shall be tryed where his Land is, as oftentimes it hath been for adherence to the Kings enemies in *Scotland*: And so (by my faith) if one be Miscreant, his Land is forfeitable, and the Lord thereof shall have the Escheat, and that is good reason. For if a man who is out of the Faith of the King, shall forfeit his Land for the same; *a fortiori*, he who is out of the faith of God; and that he swore to be Law, Whereupon *Burgh* said, *Respondes ouster*: And so saith *Fitzherbert*, *Tryal* 54. by that Plea and Judgement, Miscreancy and Deprivation at *Rome* shall bee tryed here: And there the *Venire facias* was awarded to the Sheriffe where the Church was, and not to the Bishop of *Durham*; and so the Miscreancy and Deprivation shall bee tryed where the Church is. The third Point was, Whether an Administrator might count of his own Possession, although he was never possessed; and the whole Court were of Opinion that he might, if the Intestate at the time of his death was possessed; The Administrator may declare of Goodstaken out of his owne Possession, although he was never possessed; for of transitory things, the Law casts upon him a sufficient possession to maintain an Action Possessory, as the Lord before seisin may have a Ravishment of Ward, &c. But otherwise it is, if one take the Goods of the Intestate out of his Possession before he dieth, for then but only a bare right comes to the Administrator. And that is to bee meant when the Goods are taken *Transgressivè*, and not *Destitutivè*. The fourth Point was, Whether the Jury might find matter done out of the Realme; and if that should abate the Writ or not. And they held also clearly, That upon a generall Issue, the Jury may find a Forrain matter, as a thing done out of the Realme; but it shall not abate the Writ, if it be not matter of substance, and pleaded before: But here the finding of the Letters of Administration, is more then they had in Issue; and also is but matter of Evidence; for the substance in this Case was the Possession, and not the Administration, for he might have an Action of his Possession without shewing the Letters of Administration: And afterwards Judgement was given for *Carter* the Plaintiffe.

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Mich. 27. Eliz. In the Kings Bench.

42. FUTTER and BOOROMES Case.

THE Case was, that the Queen by her Letters Patents anno 12. of Reign, *ex certa scientia & mero motu, &c.* did grant to B. *totam illam portionem decimarum & Garbarum in L. in Com. Norf. una cum omnibus aliis decimis suis cujuscunque generis & speciei fuerint in L. nuper in possessione Johannis Corbet, or his Assigns, nuper Abath. de Wenly. pertinent. &c.* And in fact the Parsonage of L. was parcell of the Abby of Wenly, and out thereof was a portion appertaining to another Church; And this Rectorie came unto the Queen by the Statute of dissolution of *Abbyes*: The question was, whether the Rectorie do pass by the Grant, *totam illam portionem*: there being also words in the Patent, *viz. Non obstante* any misnomer, misrecital, or other such things which are recited in the Statute for confirmation of Patents. *Hamon*: the Grant is good; for this word (portion) shall not be said a thing severed from the Church and Rectorie; And all the Tythes are parcel of the Rectorie: for as 44. E. 3. 5. is, before the Council of *Lancaster*, a man might give his Tythes to what Church he pleased; And when any thing is given to the Church, it is a portion belonging to the Church; as the Glebe is, which is but a clod of Earth, which is parcel of the Rectorie and a portion of it. And a case in this Court in the time of this Queen, was argued, and there in a Rectorie there were many Priests, and each of them knew his portion, so as they were called portionary Priests, which was in respect they had each of them interest in the Church, and not because their portions were severed each from the other. And 22. E. 4. 24. by *Pigor* it is said, If a Parson hath any Tythes in another Parish, as appertaining to his Church, it is called a portion; so as portion is not meant that which is severed by it self as in gross; But by portion is meant all the Tythes appertaining to the Rectorie, or the Rectorie it self. For as 22. Ass. 9. is, If the King have Tythes of those Lands which lie out of any Parish, if he grant *totam portionem decimarum, &c.* I conceive, that the Tythes shall pass thereby: And yet it is a thing severed from other Tythes; but it doth contain all the qualitie of Tythes in that place. And also if the King grant his Rectorie of D. to J. S. saving to him the Tythes, and afterwards grants *totam portionem Decimarum, &c.* I conceive cleerly (under correction) that the Tythes shall pass. And in the principal case, If the Tythes shall not pass by this word (portion;) yet the *Non obstante* in the Letters Patents *de male nominando, &c.* shall make it to be a good grant, and that so the Tythes shall pass thereby. We are also to consider, if by any words

subsequent in the Patent, the grant be not good. *viz.* by these words, *cum omnibus aliis Decimis &c. in tenura & occupatione Johannis Corbet &c.* Whereas in truth *John Corbet* was never Occupier of them: And as to that, I conceive, That the words before, *cum omnibus, &c.* passe the Tithes; And that the words after, shall not abridge or controule the largeness of the precedent words; and to that purpose is the Case 39. E. 3. 9. of the Grant of the King to the Earle of *Salisbury, &c.* In the end of which Grant were these words, *Quas nuper concessimus patri, &c.* although that the thing granted, was never granted to the Father; yet the Grant was good, and not restrained by those words coming after. 2. E. 4. A Release was pleaded of a right which the party had in Lands of the part of his Father, &c. there, although he had the Land from the part of his Mother, yet the Release was good. In the Case of the Bishop of *Bath and Wells*, which was lately argued in the Exchequer Chamber; There it was agreed, That if the King grant a Faire in such a place, or elsewhere in the County of *Somerset*; if he mistake the County, in putting one County for another, yet the Grant is good, and all that coming after the *alibi* shall be void. He further argued, That all the matter appearing by speciall Verdict, is not well found; for the Jury find, That no Tithes were in the Occupation of *John Corbet* at the time of the Grant; and no mention is in it, that they were not in his Occupation nor in the Occupation of his Assignes; for they might be in the Occupation of his Assigns, although that they were not in his own Occupation: For in a Verdict, if it strongly imply any thing not expressed (as in the Case of *Trivilian*: where the Jury found a devise of Land, without saying, That the Land was holden in Socage) it is a good finding of the Jury; for no devise could be, if it were not of Land holden in Socage, and therefore that tenure is implied. Contrary, When a man is to plead a Devise; but where the Verdict doth not strongly imply a thing, it shall not be good; as in *Scolasticas* Case, *Pl. Com.* 411. Exception was taken that the Jury did not find, That the Devisor had not any Heir Male alive *præter* the said *John* and *Francis*; for if he had, the wife of the Plaintiffe had no cause of Action. And it was there holden by *Harper*, That it was not a good Verdict for the incertainty; so in our Case. *Cook* contrary: 1. The Grant is not good, and the Rectory is no part of it; nor can they passe by the word [Portion.] 1. By the Etimology of the word; for Portion is a thing in grosse by it selfe, and cannot passe by that thing which is intended *Nomen Collectivum*, as a Rectory is. So of a Manor; if a man grant *rotam illam portionem Manerii*, hee being seised of a Manor, nothing passeth; for *portio* is no more then *partie*, as the Latinists say; and then if a man grant all that part of his Manor, or part of his Tithes in *D.* and he be seised of the whole Manor of *D.* or of the Rectory of *D.* nothing passeth. Also the words after expound the Queens mind, for the words precedent are coupled with

with a (*Cum*) after, *scil. Cum omnibus aliis*, &c. So as the first part shews the grant of Tithes, and the later part shews what Tithes; viz. those which were in the Occupation of *John Corbet*. So as but part is granted: and in the Kings Grant, a part shall not be taken for the whole; and so in no case, if not by the Figure Synecdoche, which cannot be in cases of Grants at the common Law. Also the words are, *totam illam portionem*, &c. and not *totam meam portionem*, &c. and the word [*illa*] or [*that*,] ought to have a word [*What*,] which is a word shewing in whose possession the portion was. Also the Kings Letters Patents ought for the most part be taken according to the meaning of the King; for the case was in the Exchequer: That where the King granted all his Tenements in *D.* that nothing passed by that Grant, but the Houses. Otherwise it is in the case of a common person. So 22. *Ass.* where the King grants goods of Felons *quorumcunque damnatorum*, it shall not extend to Treason, nor to murder of the Kings Messenger. So 8. *H. 4. 2.* If the Grant be of all the goods of those who *pro aliqua transgressione sive delicto*, &c. *forisfacere deberent*; it shall not extend to those who are *felo de se*. Also the *Non obstante* doth not help the matter; For I take this difference, When nothing passeth by the words precedent, *Ex vi termini*, there nothing is helped by the *Non obstante*: But if any thing passe by the precedent words, *Ex vi termini*, there a *Non obstante* may make the thing good, which otherwise should be void: As if the King grant to *J. S.* the Manor of *D.* *Non obstante* that he is seised for the term of life thereof; it is a void Grant: But if the Grant were of the Manor of *D.* notwithstanding that *I. S.* hath it for life, here the *Non obstante* makes the Grant good; which otherwise should be the ignorance of the King to make a Grant of that of which he is excluded by the *Non obstante*; because thereby he takes knowledge of the particular estate, and so he is not deceived. As to the matter moved against the Verdict, I conceive, that it makes against the other side; for it was on his part to prove the Occupation: and if there be no Occupation at the time of the Lease, the Grant is void: and he was to prove it, being in the affirmative. And then, *in re dubia majus inficiatio quam affirmatio intelligenda*: and [a May be] may be intended in every case. And if such construction should be in speciall Verdicts, I dare affirm, that by such [May bees] all speciall Verdicts shall be quashed: But the Law is, to give a favourable construction of them, according to the meaning of the Jurours. *Snagg* contrary: and by him these words, [*cum omnibus aliis*, &c.] are void in the Kings case: and vouched the case of 29. *E. 3. 9.* before vouched; Where the King had granted to the Earl of Salisbury the custody of the Lands of the Prior of *Mountague*, being seised into the Kings hands as a Prior Alien: and afterwards the Earl died, his Heir within age, whereby the said Lands, and others, and Advowsons, came to the Kings hand by reason

reason of minority; and afterwards the King granted to the Son all the Lands and Advowsons which were *Patrii sui, ac omnes terras, ac omnes advocaciones* of the said Prior, which the King had before given to the father of the said son. And it was there holden, That although that the Advowsons passed not to the Father, yet by that grant they did passe; and that these words [which he granted to his father] were merely void. *Clenche* Justice. Nothing passeth by this word [Portion] for it is a thing in gross, and a thing in gross cannot contain another thing, and a word which signifies a thing in grosse cannot passe another thing: As if a man grant all his Services in *D.* it is to be intended Services in grosse; and if he have not any Services, but those which are parcell of a Manor, nothing shall passe by those words. But I conceive, That those Tithes which are parcell of the Rectory shall passe by these words, *Cum aliis, &c.* For although that the words are, in the tenure of *John Corbet*, yet if they were not in his tenure, the *Non obstante* will help it; for it is, *Non obstante* any misnaming of the Tenants, or of the quantity or quality of the Tithes; so as these words imply as much as if the Grant had been in the tenure of *John Corbet*, or of any other in *L.* or elsewhere. *Gandy* Justice. If the words *Totam illam portionem* were left out of the Book, the other words, *Cum omnibus aliis*, shall passe nothing; and those words *Totam illam portionem*, are as nothing to passe a thing not in grosse; and by consequence nothing shall passe by the other words: And afterwards Judgement was given, That nothing passed by the Letters Patents.

Hill. 28 Eliz. in the Kings Bench.

43. CROPP'S CASE.

CROPP made a Lease for years, reserving rent at *Mich.* upon Condition, That if the rent be behind at *Mich.* and a Month after, that he might enter. The Lessee after *Mich.* and before the Month ended, sent his servant to the house of *Cropp*, to pay the money to *Cropp*; the servant coming to *Cropps* house, found him not, for he was not at the House; the Servant delivered the Rent to one *Margery Briggs*, who was his Daughter in Law, to deliver the same to *Cropp* the Lessor. And the same *Margery* at one or two dayes before the payment of the said Rent, had received the Rent in the like manner, and had paid it to *Cropp*, and he had accepted of it: But now he refused to receive it of her, but at the last day of the Month he went to the Land, and there demanded the Rent, and because it was not paid, he entred. *Laiton* argued for the Lessor. That his entry was lawfull, for

for, he said, That the Tender made by *Margery Briggs* to the Lessor was not sufficient: 1. Because the Servant of the Lessee had Authority to deliver it to the Lessor; therefore when he delivers it to another, he hath not pursued his Authority. 19. *H. 8.* & 27. *H. 8.* Letter of Attorney made to diverse to give livery of Seisin. If one make Livery alone, it is void; 34. *H. 6.* If a *Capias* be to many Coroners, and one execute it, it is void; 18. *E. 4.* If one hath a Letter of Attorney to make Livery, he cannot transfer this Authority to another to make Livery for him. Also, if in this Case a Stranger had tendered the Rent, the Lessor was not bound to receive it; as upon a Mortgage, if a Stranger tender the Money, the Mortgagee is not bound to accept of it. 21. *E. 4.* In case of Corporall Service, as Homage or Fealty, the demand is to be made of the person; but of Rent, the demand is to be made upon the Land, because the Land is the Debtor. *Clenche* Justice conceived, That if the Lessee himselfe had delivered the Rent to *Margery Briggs*, that it had been good, but it is a doubt if good, made by the servant, for he could not transfer his Authority to another. *Wray* Chief Justice, If it were upon a Bond, the Obligee was not bound to accept of it before the day; so if it were payable at *Mich.* only, there the Lessor is not bound to accept of it before the day: but in as much as 'tis after the day, the Month is a Liberty and Benefit for the Lessee; and it was due at *Mich.* therefore I conceive, That being tendred to him within any part of the Month, that he is bound to accept of it. And as to that, That his servant cannot transfer his Authority over, and therefore *Margery Briggs* is but a stranger in that act: that is not so, for now she is a servant in that, to the Lessor himself; and therefore there is privity enough: also she hath received the Rent for him before. What then, said *Laiton*? We can prove a speciall commandment for the time before that she received it. At another day the Case was moved again, and it was ruled against *Cropp* the Lessor, because the rent was due at *Mich.* and the month after was given because of the penalty of Re-entry; and the Tender and Refusall after the Rent was due; and within the month, saves the penalty; and also Lawes ought to be expounded *Secundum equum & bonum*, and good conscience; and the Lessor was at no prejudice, if he had accepted of it, when his Daughter in Law tendred it unto him; and therefore it was conceived, That he had an intent to defraud the Lessee of his Lease; and the Law doth not favour Frauds; and therefore it was adjudged against *Cropp* the Lessor.

40 *Prideaux Case. Harm. and Higham's Case.*

Hill. 28 Eliz. In the King's Bench.

44 *PRIDEAUX'S Case.*

IN this Case it was moved, Where a man marrieth a woman who is an Adminiftratrix, fo as the Suit is to be in both their names, Whether they fhall be named in the Writ Adminiftrators or not? *Wray* Chief Juftice, They fhall be; for by the Enter marriage, the Husband hath Authority to entermeddle with the Goods, as well as the Wife; but in the Declaration, all the fpeciall matter ought to be fet forth; and fo fome faid is the Book of Entries, That both of them fhall be named Adminiftrators.

Hill. 28. Eliz. in the King's Bench.

45.

AN Action upon the Cafe was brought for thefe words, viz. Thou art a Cozener and a Bankrupt, and haft an Occupation to deceive men by; the words were fpoken of a Gentleman, who had One hundred Pound land *per annum* to live upon; and therefore although he ufed to buy and fell Iron, yet becaufe he was not a Merchant, nor did not live by his Trade, the better Opinion of the Court was, That the words were not actionable, and fo adjudged.

Hill. 28. Eliz. in the King's Bench.

46 *HARWOOD and HIGHAM'S Case.*

ONE had Houfes and Lands which had been in the tenures of thofe which had the Houfes: and he devised his Houfes with the Appurtenances; and it was holden, and fo adjudged by the whole Court, That the Lands did paffe by the words, [With the Appurtenances:] For it was in a Will, in which the intent of the Devifor fhall be obferved.

Trinit. 28. Eliz. Rot. 1130. in the Common Pleas.

47 The QUEEN and SAVACRE'S Case.

IN A *Quare Impedis* by the Queen against *Savacre* Clerk, the Case was this; The Queen presented to a Parsonage which was void, by the taking of another Benefice by the said *Savacre*; and the said *Savacre* for to enable him to have two Benefices, pleaded, That he was the Chaplain of Sir *James a Croft*, Controller of the Queens House, who, by the Statute of 21. H. 8. cap. 13. might have two Chaplains, and might qualifie them to take two Benefices; to which it was replied, That the said Sir *James a Croft* had two other Chaplains, which are qualified to have two Benefices, and have also two Benefices by reason of that qualification, and also are alive; so as he is a third Chaplain, who could not be qualified by that Statute. To which it was answered; That one of those two Chaplains is removed and discharged by the said Sir *James a Croft* to be his Domestickall Chaplain: *scil. Capellanum familiarum*, as it was pleaded, and so he hath now but two Chaplains, of which the Defendant was one; upon which there was demurrer joyned: Three Points were in the Case: 1. If the qualification, *Sub sigillo*, be sufficient within the Statute, without the Signature or name of Sir *James a Croft*. 2. When two Chaplains are qualified, and one is removed out of service, if he might qualifie another by the Statute, the party being alive who was qualified. 3. Whether he remain his Chaplain, notwithstanding such removall during his life. Upon which Points, after perusall of the Statute, it was agreed by the whole Court, That the Queen ought to have Judgement, and so they gave Judgement presently: And the reasons of their Judgement were, for the first Point, Because that the Defendant *S. vacre* was not qualified, *Sub Signo & Sigillo pradiet. Jacobi a Croft*, but only *Sub Sigillo*; and the words of the Statute are, viz. Under the Sign and Seal of the King or other their Lord or Master, &c. Which words, Or other their Lord or Master, shall be referred to Sign and Seal, which is limited to the King. And as to the second Point, they held the Law to be cleer, That after that he hath retained as many as by the Law he may retain, and they are *Sub Signo* and *Sigillo* testified to bee his Chaplains, and by reason thereof have qualification to have two Benefices, and have two Benefices by vertue thereof, although that afterwards they are removed for displeasure or otherwise out of service; yet during their lives, their Master cannot take other Chaplains, which may by this Statute be qualified; for so every Baron might have infinite of Chaplains which might be qualified, which was not the meaning of the

the Statute; and of that opinion is the Lord *Dyer* in his Reports. And as to the third Point, they held, That although he were removed from the Domestickall Service of the Family, yet hee did remaine Chaplain at large; and so a Chaplain within the Statute: And further, the Opinion of the Court was in this Case, That if the party qualified do die, the Queen, or other Master mentioned in the Statute, might qualifie another againe: *Quod nota.* The Case was entred *Pasch. 28. Eliz. Ror. 1130. Scot.*

Mich. 28, 29. Eliz. in the King's Bench.

48.

ONE made a Deed in this forme, *Noverint, &c.* that I have demised and to Farme letten all my Lands in *D.* to *J. S.* and his Wife, and to the Heirs of their two Bodies for thirteen years: And it was moved, That it was an Estate in taile, and *5. E. 3.* and *4. H. 4.* were vouched. But *Clenche* Justice (who was only present in Court) was of Opinion, That it is but a Lease for years, although it was put that Livery was made *(secundum formam chartæ)*: and he said, That if one make a Lease for forty years to another, and his Heirs, and makes Livery, that it is but a Lease for years; and he said, It is no Livery, but rather a giving of Possession. But he would have it moved again when the other Justices came.

Mich. 28, 29. Eliz. in the King's Bench.

49

AN Action upon the Case was brought against an Inn-keeper upon the Custome of *England*, for the safe keeping of the things and Goods of their Guests; and he brought his Action in another County then where the Inn was; and it was said by *Clench* Justice, That if it be an Action upon the Case, upon a Contract, or for words, and the like transitory things, that it may be brought in any County; but in this Case he said, It ought to be brought where the Inn is.

Mich.

Mich. 28, 29. Eliz. in the King's Bench.

50.

ONE charged two men as Receivers; The Question was, Whether one of them might plead, *Ne unque son Receiver*; and it was moved, That he could not, but ought to say, *Ne unque son Receiver*, *absq; hoc*, that he and his Companion were Receivers. *Clenche* and *Sir Justices* held, That it was well without Traverse, and *Vide* 10. E. 4. 8. Where an Account was brought against one, supposing the receipt of Two hundred Marks by the hands of *I. P.* and *R. C.* The Defendant (as to One hundred Marks) pleaded, That he received it by the hands of *I. P.* *tantum*, without that, that he received it by the hands of *I. P.* and *R. C.* And as to the other One hundred Marks, he received them from the hands of *R. C.* only, without that that he received by *I. P.* and *R. C.* And there it was doubted, Whether it be good or not. But in the end of the Case, by *Fitz. Accompt.* 14. If an Account be brought against two, and one saith, He was sole his Receiver, and hath accounted before such an Auditor, if the Plaintiff answer unto his Bar, he shall abate his Writ, because the Receipt is supposed to be a joint Receipt: And it is not like unto a *Præcipe quod reddat* against two.

Mich. 28, 29. Eliz. in the King's Bench.

51.

AN Action upon the Case was brought against one, for that he said to another, I will give thee Ten Pound to kill such a one; and the Question was, Whether the Action would lie. It was said, by *Sir Thomas Cockaine*, that such a Lady had given poyson to such a one to kill her Child within her; that the words were not Actionable. Also one said, That another had put Gun-Powder in the Window of a house, to fire such a house, and the house was not fired; adjudged that the words were not Actionable. The Case was betwixt *Ramsay of Buckinghamshire* and another, who said, That he lay in wait to have killed him; it was found for the Plaintiff, and he had Forty Pound Damages given him. But of the Principall Case the Court would advise.

Mich. 28, 29. Eliz. in the Kings Bench.

52

IT was holden by the Court, That the *Habeas corpus* shall be alwayes directed to him who hath the custody of the Body: Therefore whereas in the case of one *Wickham*, it was directed to the Maior, Bailiffs, and Burgeses, Exception was taken unto it, because the pleas were holden before the Maior, Bailiff and Steward: but the Exception was disallowed: But otherwise it is in a Writ of Error; for that shall be directed to those before whom the Judgment was given. In *London* the *Habeas corpus* shall be directed *Majori & Vicecomis. London*, because they have the custodie, and not to the whole Corporation: But I conceive, that the course is, that the Writ is directed *Majori, Aldermannis, & Vicecomitibus, &c.*

Mich. 28 & 29 Eliz. In the Common Pleas.

53 MARSH and PALFORD's Case.

OWen moved this Case, That one had an upper chamber in Fee, and another had the neather or lower part of the same house in Fee; and he who had the upper chamber pulled it down, and he which had the lower room, would not suffer him to build it up again. But the opinion of the Justices was, that he might build it up again, if he did it within convenient time. And there it was said, that it had been a Question, Whether a man might have a Free-hold in an upper chamber?

Mich. 28, 29. Eliz. in the Kings Bench.

54.

A Question was moved to the Court, Whether Tithe should be paid of Heath, Turf, and Broom? And the opinion of *Suit Justice* was, That if they have paid tithe Wool, Milk, Calves, &c. for their cattell which have gone upon the Land, that they should not pay tithe of them. But some doubted of it, and conceived, That they ought to say, that they have used to pay those Tithes for all other Tithes; otherwise they should pay tithe for Heath, Turf, Broom, &c.

Mich.

Mich. 28, 29 Eliz. in the Kings Bench.

55.

TWO Parsons were of two severall Parishes, and the one claimed certain Tithes within the Parish of the other, and said, That he and all his Predecessors, Parsons of such a Church, *scil.* of D. had used to have the Tithes of such Lands within the Parish of S. and that was pleaded in the Spiritual Court: and the Court was moved for to grant a Prohibition: And *Suis* and *Clenche* Justices, He shall have a Prohibition, for he claims onely a portion of Tithes, and that by prescription, and not meerly as Parson, or by reason of the Parsonage, but by a collaterall cause, viz. by Prescription, which is a Temporall cause and thing. And it is not materiall, whether it be betwixt two Parsons. *Vide* 20. H. 6. 17. *Br. Jurisdiction* 80. and 11. H. 4. and 35. H. 6. 39. *Br. Jurisdiction* 3. Where in Trespasse for taking of Tithes, the Defendant claimed them as Parson, and within his Parish: and the Plaintiff prescribed, That he and his predecessors, Vicars there, had had the Tithes of that place time out of minde, &c. And the opinion of the Court was, that the right of Tithes came in debate betwixt the Vicar and the Parson, who were Spirituall persons, who might try the right of Tithes: And therefore there the Temporall Court should not have the Jurisdiction.

Mich. 28, 29 Eliz. In the Kings Bench.

56

IN an Indictment upon the Statute of 8. H. 6. of Forcible Entry, the Case was this: One was Lessee for yeers, and the Reversion did belong unto the Company of Goldsmiths: And one was indicted for a forcible Entry, and the words of the Indictment were, That *expulsi & disseisivi* the Company of Goldsmiths, & *quendam l. s. tenentem expulsi*. Cooke took exception to the Indictment, and said, that a disseisin might be to one although not in possession, as to a Reversioner upon a term for yeers, or upon a Wardship; but he could not be expelled if he were not in possession, for *privatio presupponit habitum*: And after it saith, that the Tenant was expelled; and two cannot be expelled where one onely was in possession: therefore it ought to have said, that the Tenant of the Free-hold was disseised, and the Termor expelled; and it applies the word *expulsi* to both. And *Filer* took another Exception, that the Cart is set before the horse: For he

he who had the Free-hold could not be disseised, if his Termor were not first ousted : and the Indictment is, That the Tenant of the Free-hold was expelled and disseised, and then the Termor was expelled. But *Sni* Justice, as to that, said, that the later clause, *scil. et quendam I.S. tenentem, &c.* is but surplusage : For if one enter with force, and expell the Tenant of the Free-hold, it is within the Statute of 8. H. 6. Then *Fuller* moved, that the Indictment doth not shew the place where he expelled him. But *Clench* Justice said, that that was not material, for he could not expell him at another place then upon the Land : As a man cannot make a Feoffment by livery and seisin at another place, but upon the Land, unless a Feoffment with Livery within the view. And as to the Objection of *Cook*, that the Indictment is, that he disseised and expelled the Tenant of the Free-hold out of the possession of the Free-hold : To that he answered, that the possession of the Termor is the possession of him in the Reversion.

Mich. 28, 29. ELIZ. in the King's Bench.

57

A Man seised of a Copy-hold in Fee, made his Will, and thereby he devised the same unto his Wife for her life ; and that after her death, his Wife or her Executors should sell the Land : He surrendered to the use of his Wife, which was entred in *hac forma* ; viz. to the use of his Wife for life, *Secundum formam ultimæ voluntatis*. The Woman sold the Land during her life : The question was, Whether she might sell or not ? *Sni* Justice said, That the intent doth appear that she might sell during her life ; for when it saith, That she or her Executors should sell after her death, it is meant the Estate which is to come after her death, for the Wife after her death could not sell. The second Point was, When the surrender is to the Wife for life, *secundum formam ultimæ voluntatis*, Whether here she have the Land for life, and the Fee also to sell. *Clenche*, If she had not the Fee to sell, then the words *Secundum formam ultimæ voluntatis*, should be void ; for the Surrender to the use of the wife for life, gives her an Estate for life, without any other words. *Sni*, If it were *ad usum ultimæ voluntatis*, without speaking, what Estate the Wife should have ; no doubt but she should have for her own use for life ; and that afterwards she might sell the Land ; but he said, As the Case is put, it is a pretty Case : And it was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

58

THis Case was moved in Court. A Copy-holder committed Waste, by which a forfeiture accrued to the Lord, who afterwards did accept of the Rent: The question was, Whether by this acceptance he were concluded of his Entry for the Forfeiture. *Cook* said, He was not, for it is not as the Case 45 E. 3. where a Lease is made upon Condition that the Lessee shall not do Waste, and he commits Waste, and then the Lessor accepts the Rent, there he cannot enter; But otherwise is it of a Copy-hold, for there is a condition in Law, and here in Fact; and a condition in Fact may save the Land by an Acceptance, but a condition in Law cannot; for by the condition in Law broken, the Estate of the Copyholder is merely void. And the Court agreed, That when such a Forfeiture is presented, it is not to Entitle the Lord, but to give him notice; for the Copy-hold is in him by the Forfeiture presently without any Presentment. A man made a Lease for years, upon condition that he should not assign over his Lease, and it was reserving Rent; and after he did assign it, and then the Lessor accepted the rent, there he shall not enter for the condition broken. Lessee for years, upon condition, that he should not do Waste, and the Lessor accepts of the Rent for the quarter in which the Waste was done, yet he may enter; but if he do accept of a second payment of the Rent, then it is otherwise; but if it were upon condition, That if he do waste, that his Estate shall cease: There no acceptance of the Rent by the Lessor can make the Lease good. It was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

59

THE Lord Admirall did grant the Office of Clark or Register of the Admirall Court, to one *Parker* and *Herold* for their lives, & *coram diutius viventi*: And *Herold* bound himself in a Bond of Five Hundred Pound to *Parker*, that the said *Parker* should enjoy the Office, *cum omnibus proficiis* during his life; And afterwards *Herold* did interrupt the said *Parker* in his Office; upon which he brought an Action of Debt upon the Bond. The Defendant pleaded, That such is the custome, That the Admirall might grant the same Office for the life of the Admirall only; and that he is dead, and so the Office void; and

and that he did interrupt him, as it was lawfull for him to do; and demanded Judgement of the Action. Upon which *Cook* did demur in Law; and he took divers Exceptions to *Herolds* Plea. 1. That hee hath pleaded a Custome, and hath so pleaded it, that no Issue can be taken upon it; for he saith, *Quod Usitatum est, quod Admirallis pro tempore existens non potest concedere Officium praelit. nisi pro termino vite sue*; and doth not shew where the Court is holden; and doth not say *Quod talis habetur consuetudo in curia*, as he ought, and as it is in 4. & 5. *Phil. & Mar. Dyer* 152. in an Assize brought of the same Office of Registership of the Admiralty: for there he brought Assize *de libero tenemento suo in Ratcliffe*; and alledged, *Quod per consuetudinem in curia Admiral. a tempore, &c.* And he said, That the Court hath been used to be holden time out of mind, &c. as well at *Ratcliffe* as elsewhere. And if the place be not alledged, then it cannot be known from what place the *Visme* shall come: See also that forme observed in the Book of Entries 75. b. So in an Assize of the Office of *Philizer* in the Common Pleas it was alledged where the Bench was, *viz. in Com' Midd'* as it is in my Lord *Dyers* Reports. Also 2. he doth not say, That *Curia Admirallis* is an ancient Court, &c. as he ought; for in 22. *H. 6.* it is said, That where a prescription is alledged and pleaded in a Court, he ought to say, That it is an ancient Court, *in qua habetur talis consuetudo, &c.* for a Prescription cannot be in any Court, if it be not an ancient Court. The third matter was, Because that in the Condition of the Bond it is said, That they are seised of that Office to them for their lives, & *corum diutius viventi*: therefore he shall be estopped to say, That it is good only for the life of the Admirall, as in 18. *E. 4. 4.* He cannot speak against the Condition of the Bond, although it be but a supposal or recital. The fourth matter was, Because he hath bound himself, that the other should enjoy the same all his life without interruption: although that the Office become void by Forfeiture or otherwise, yet he cannot have it against his own Bond. And *Cook* said, There is a Case in my Lord *Dyers* Reports; where, if the Lessor warrant the Estate of the Lessee, if he be ousted by a stranger without Title, he shall have no action of Covenant: But if the Covenant be, That he shall quietly enjoy it against him, although that the Lease become void; yet the Lessor shall not take advantage against him. *Clenche* Justice, If the Party occupy the Office by right or by wrong, it is not materiall; he is not to interrupt him against his owne Bond.

Mich.

Mich. 28, 29. Eliz. in the Kings Bench.

60

AN ACTION of Debt was brought for an Amercement in a Court Baron: And the Plaintiffe declared, That the Defendant was amerced at the Court Baron of the Farmor, of the Manor of *Cinkford*: and exception was taken, because it might be that he was amerced at another Court of the Farmor; and therefore he ought to have said; At the Court Baron of the Manor, and not at the Court of the Farmor of the Manor. Another Exception was, That hee said, That at such a Court holden before the Steward there, he was amerced: Whereas, in truth, the Court Baron is holden before the Suitors, because they are the Judges, and not the Steward; and for that was vouched 4. H. 6. and *Fitz Nat.* in the Writ of *Moderata Misericordia*. *Sui* Justice. True it is, that the Suitors are Judges in Real Causes, not in Personal. Another Exception was taken, That he doth not shew, That he had requested or demanded the Amercement. But to that it was answered, That [*Licet sepius requisitus*] was in the Declaration, and that is sufficient, because it was a Duty before the Request; but if it first begin upon the Request to be a Duty, then it ought to be alledged *In factis* that there was a Request. Another Exception was, That no Custome was alledged that they might amerce, for it is not incident of common right unto a Court Baron for to amerce, but to distrain or seise; therefore Custome ought to warrant it. The Case was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

61.

AN ACTION of Debt was brought upon a *Concessit Solvera*, according to the Law Merchant, and the custome of the City of *Bristow*, and Exception was taken, because the Plaintiff did not make mention in the Declaration of the custome: But because in the end of his Plea he said, *Protestando, se sequi querelam secundum consuetudinem civitatis Bristow*; the same was awarded to be good; and the Exception disallowed.

Mich. 28, 29. Eliz. in the King's Bench.

62.

Sir Justice said, That if the custome of a Manor be, That the Housage might make By-Lawes, it shall bind the Tenants, as well Freeholders, as Copy-holders: But *Tanfield*, of Councell in the Case, said, That it is no good nor reasonable custome: But such By-Lawes may be made by the greater number of the Tenants, otherwise they shall not bind them.

Mich. 28, 29. Eliz. in the King's Bench.

63

The Vicar of Pancras Case.

THE Vicar of *Pancras* sued one in the Spirituall Court for Tithes. And he pleaded, That some of them, for which the Vicar did sue, did belong to the Parson; and that he had paid them to the Parson, and prayed a Prohibition. *Cook*, He shall not have a Prohibition; for by this Plea he hath put in Debate the controversie of the Tithes, betwixt the Parson and Vicar; and then when both are Spiritual Persons, the common Law shall not hold Plea of them, as is 35. *H. 6. 39.* and 31. *H. 6.* Also by this Plea a *Modus decimandi* is not in question, but the right of the Tithes, and that doth appertain to the common Law. And there *Cook* said, That it is holden in 11. *H. 7.* That Unions and Endowments of Vicarages do appertain to the Spirituall Law. Also the prescription of the Defendant was, That he had used, time out of mind, &c. to have for horses a giftment, herbage, 3. *d. ob. 9.* and after that they had used to pay for every Cow to the Vicar 4. *d.* and for the Calfe and Milk of every Cow, 6. *d.* And *Cook* took exception that such prescription was double and repugnant in it self, for he prescribes that he paies for herbage; and then he prescribes, That he paies for every Cow 4. *d.* which cannot be meant but for herbage of the Cow, for it is not for Milk or Calfe of the Cow, for he prescribes to pay for them 6. *d.* He took another Exception, That he prescribes that he hath used to pay, but doth not shew that he hath paid; for so he ought to do, for otherwise he shall out the Spirituall Court of Jurisdiction, and yet not give any remedy in this Court. Also, he saith, That he hath paid, but doth not shew where; and the other may say, *non solvit*, and so an issue shall be, and no place from whence the *Visine* shall come.

come. *Godfrey* contrary. If one be a lay man, and the other a spirituall man, then the tryall shall be at the common Law, as it is holden 31. *H.6.* and 2. *E.4.* And the defendant here is a lay man, who makes prescription of a *Modus decimandi*, for the discharge of Tithes in kind. As to that which *Cook* said, That he prescribes that he hath used to pay to the Parson, and doth not say, That it was due to the Parson; and if he pay the Vicars Tithes to the Parson, he doth wrong to the Vicar; He saith, That he hath paid, and used to pay 4 ^d. to the Parson in full satisfaction, &c. and *reddendo singula singulis*, it is good enough. As to the doubleness or repugnancy of the Prescription, he said, That the prescription is set forth according to the truth of the matter. As to the place, for that, no issue can be taken upon it; he answered, That he conceived the issue will bee upon the Custome or *Modus decimandi*. And *Gawdy* Justice agreed to that. *Suit* Justice, There is no *Modus decimandi* alledged; for when he saith, That he hath paid to the Parson that which the Vicar demands, that is no answer. *Gawdy* Justice, The prescription is repugnant, as *Cook* said; and he said, That the herbage is for all Kine, as well for those which have Calves, as those which have not. No Prohibition granted.

Mich. 28, 29. Eliz. in the Kings Bench.

64. WINDSMORE and HULBORD's Case.

THE Case was this. A man gave lands to *J. S. Habendum* to him, and to three other for their lives, *et eorum diutius viventi successivè*: The question was, What estate *J. S.* had: and if after his life there were any occupancy in the Case? *Cooke*, That *J. S.* had an estate but for his life onely, because he cannot have an estate for his life, and for the life of another, where the interest commeth both in *presenti*: but he may have an estate for his own life in present interest, and the remainder thereof for anothers life: But this *Habendum* by no means can create a Remainder. And he said, that as a Lease to one for life, *Habendum* to him & *primogenito filio suo*, was no Remainder *primogenito filio* (although some held to the contrary.) So a Lease for years, *Habendum* to him and to another, was no Remainder to the other. Also the word *successivè* doth not make a Remainder, as 30. *H.8. Br. Joynits* 53. where a Lease for life to three, or for years to three, *Habendum successivè*; yet they have a joynt estate: and *successivè* is void: for he said, It is uncertain who shall have it first, and who secondly. Also one cannot have an estate for his own life, and for the life of another at the same time in present interest; for

the greater will drown the lesser : But if the greater be *in presenti*, and the lesse *in futuro*, as a lease for his own life, the Remainder to him for another mans life, it is otherwise. As a lease for his own life, the Remainder for yeers, is good. But if I make a lease to you for your own life, and 100 yeers, both to begin at the same time, the Lease for yeers is drowned : and an estate for his own life is greater then an estate for anothers life, and shall drown the estate for anothers life. *Vide 19.E.3. Surv. 8.* where Tenant for life of a Manor did surrender to Tenant for life in Reversion. And *12. H.7. 11.* and *Perkins 113.* That if there be a Lease for life to one, the Remainder to another for life, and the Lessee for life doth surrender to him in the Remainder, it is good. So *Dyers Reports.* A lease is made to one for the term of another mans life, without impeachment of Waste, the Remainder to him for his own life ; he is now punishable for waste, for the first estate is surrendered. *Gandy Justice,* If a lease be made to one for his life, and so long as another man shall live, *quare* what estate he hath. 2. If there can be any Occupancy in the Case : for if the estate be void, the limitation upon the estate is void : therefore if the estate for the other mans life be drowned in the estate for his own life, that can be no Occupancy. Also the Occupancy is pleaded, That such a one entred, and doth not say, claiming as occupant. For if one come hawking upon the land, he shall not by such entry be an Occupant ; and in the book of Entries it is pleaded that he entred clayming as Occupant. *Clenche Justice,* Every Occupancy ought to be in possession ; for otherwise the Law casts the interest of it upon him in the Reversion. But *Gandy* and *Suir* Justices were utterly against him in that ; for then they said, there should be no occupancy, if the party were not in by Lease, or such like means.

Mich. 28, 29. Eliz. in the Kings Bench.

65. DIKE and DUNSTON's Case.

IN an Action of Trespasse brought, the defendant did justifie as Lessee to the Lord *Mountagu*, and said, that the Lord *Mountagu* for him and his Farmors, had used to have a way over the land in which the trespass is supposed to be done: And that by rooting of a cart wheel the way was so digged and drowned, that he could not so well use his way as before, and that therefore he did fill up the cart roots, and digged a trench to let out the water : upon which the plaintiffe did demur in law : For *15.H.7.* is, that a Commoner cannot meddle with the soil : so is *12. & 13.H.8.* So he who hath Warren in the land of another man cannot meddle with the soile : and as to that, that he could not use his way so well as before,
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it is not good : for he ought to have said, That he could not use his way at all : otherwise the plea is not good. As 6.E.4. One is to lop his tree, and he cannot do it unless it fall upon the Land of another, there he may well justifie the felling of it upon the others Land, because otherwise he could not lop it at all. So if I give to one all the fish in my Pond, he cannot dig a Trench to draw out the water, unless he cannot otherwise take the fish, as with Nets, &c. Also he justifies, by reason that the Lord *Mountagu* for him and his Farmors, &c. And he was a Lessee and paid no rent, therefore no Farmor. *Cowper* contrary, He shall not have an Action of Trespass, for it is no losse or hinderance unto him, but it is for his profit, for the Land is the worse being drowned with water. If a man do disseise me, and fells trees upon the Land, and doth repair the houses, in an Assize brought against him, the same shall be recompensed in damages; because that which was done was for his Commodity: also it is incident to one who hath a way for to mend it. All Prescriptions at the first did begin by Grants. And if one grant to me his trees, the Law saith, That I may come upon the Land to fell them and carry them away off from the Land, and I shall not be a Trespassor: And by 9. E. 4. and *Perkins*, If one grant to me liberty to lay a Conduit Pipe in his Land, I may afterwards mend it *roties quoties* it shall want mending 32.E.3. If one grant to me a way, if he will interrupt me in it, I may resist him; and if he dig Trenches in the way to my hinderance in my way, I may fill them up again: The books of 12 & 13.H. 8. are not adjudged. If Lessee for years be of a Meadow, he may dig to avoid the water, and may justifie so doing in Waste brought against him. But it was said, That in that Case the Lessee hath an interest in the soil; so hath not he who claims the way in this Case. *Clenche* Justice held, That he could not dig the Soile. Then the Defendant demanded, What remedy he should have. *Suit* Justice, If he went that way before in his shooes, let him now pluck on his boots. *Gawdy*. The pleading is not good, for he saith, That he could not use his way so well as before, which is not good; but he ought to plead, that he could not use the way at all.

Mich. 28, 29. Eliz. in the Kings Bench.

IN an *Ejectione firme* The party ought to set forth the number of the Acres; for although he give a name to the Close, as Green Close, or the like, it is not sufficient; because an *habere facias seisinam* shall be awarded: But in Trespass the same may be *Quare clausum suum fregit*, &c. without naming the number or the Acres: And so it was said it was adjudged in a *Shropshire* Case.

Mich.

Mich. 28, 29. Eliz. In the Kings Bench.

67.

IN an Action upon the Case, because that the Defendant had made a Gate in one Towne, for which he could not go to his Close in another Town. *Cook* took Exception that the Writ was *Vi & armis*; and it was agreed *per curiam*, that for that cause it was not good: Also the *Visne* was of one Towne only, whereas it should have been of both; for he said, That in *Hankford* and *Russels* Case, The Nufance was laid in one Town *per quod* his Mill in another Town could not grinde; and upon Not guilty pleaded, the *Visne* came from one Town only, and it was adjudged, that it was not good.

Mich. 28, 29. Eliz. in the Kings Bench.

68 JOHN JOYCE'S Case.

AN Action upon the Case was brought against *John Joyce*, Inn-keeper of the Bell at *Maidstone* in Kent, for not scowring of a Ditch which ran betwixt the house of the said *John Joyce* and of another man; and Judgement was given for the Plaintiffe against the Defendant *Joyce*, and a Writ of Error was brought to reverse the Judgement, and divers Errors were assigned. The first Error which was assigned was, That the Plaintiffe doth prescribe, That all the Inhabitants of the Bell, &c. had used to scowre the Gutter, &c. And it was said, That that was no good forme of prescription, as in 12. H. 4. 7. Br. *Prescription* 16. Where the Plaintiffe said, That the Defendant, & omnes alii tenuram illam prius habentes, mandare debuerunt & consueverunt eam scire fossatam; and therefore the Writ was abated, for it ought to have been, *quod ipsi & predecessores sui de tempore cuius contrarium, &c.* Or that such a one and his Ancestors or Predecessors, whose Estate the Defendant hath, &c. Also if a Copy-holder prescribe, That he and all his Tenants *tenementi predii* have used to have estovers in such a Wood, &c. it is not good: but he ought to prescribe in the Manor. The second Error was, That the Prescription was uncertain, for it is, That all Tenants, &c. which extendeth to Tenants in Fee, in Taile for Life, or years; and the Prescription is the foundation and ground of the Action, and therefore it ought to be certain: As if one make Title for entry for Mortmaine, he ought to shew that he hath entred with-

within the year and day. 7. E. 6. Br. Prescription 69. It is holden, That Tenant for years or at will cannot prescribe for common; for the prescription ought to be alledged in the Tenant of the Free hold: or to alledge a Corporation, or the like: In reason, Tenant for years cannot prescribe, for his Estate hath a certain beginning, and a certain end, therefore it is not of long continuance. The third Error was, That the Plaintiffe hath not alledged, That the Defendant was Tenant at the time of the Action brought, as in the Case of Clerkenwell and Black-Friers; where the Plaintiffe brought his Action upon the Case, for that the Defendant had turned the course of the water of a Conduit Pipe, and the Declaration was, *Quod cum querens seisinus existat*, and doth not say *existit*; and so the Plaintiffe was not supposed Owner of the Scite and Messuage of Black-Friers, but only at the time of the Action brought, and not at the time of the diversion of the Water: But Judgement was given, and Error brought upon it. The fourth Error was, Because it was for scowring a Gutter betwixt the houses, &c. and doth not say, That the house was *contigue adjacens* to his house. 22. H. 6. Where Cattell escape into the Plaintiffs Close, and thereupon Trespasse brought, the Defendant said, That it was for want of Fence of the Plaintiffs Close, and it was holden no Plea, if he do not say that the Plaintiffs Close was *adjacens*. *Clench* Justice. The Prescription ought to be, That such a one, and all those whose Estate he hath, &c. have used for them and their Farmors to repair the Gutter. *Cowper*. When the Prescription runs with the Land, then he may prescribe in the Land, as all those who have holden such Lands, have used to scowre such a ditch, and the same is good. *Gawdy* Justice. If he had said, All those who had occupied such a house, had used to scowre, it had been good. *Godfrey*. If a man will alledge a Prescription or Custome, he ought to set forth, That it was put in use within time of memory. In the Prescription of *Gavelkind*, the party ought to shew, that the Land is partable, and so hath been parted. Also he prescribed That *omnes illi qui tenuerunt*, and doth not alledge a Seisin, but by way of Argument. *Suir* Justice held the pleading not good, because the words were not *contigue adjacens*. And for these causes the first Judgement was reversed.

Mich. 28, 29. Eliz. in the Kings Bench.

69 GOMERSALL and GOMERSALLS Case.

IN an Action of Account the Plaintiffe charged the Defendant as Bailiffe of his Shop, *curam habens & administrationem bonorum*. The Defen-

Defendant answered as to the Goods only, and said nothing to the Shop. And *Tansfield* moved the same for Error in Arrest of Judgment, as 14. *H.* 4. 20. One charged another as Bailiffe of his house, & *curam habens bonorum in eo existentium*, the Traverse was, That he was not *Bailivus* of the house *propt*: that is good, and goeth to all; but he cannot answer to the Goods, and say nothing to the house. so 49. *E.* 3. 7. *Br. Accompt.* 21. A man brought an Account against the Bailiffe of his Manor *habens curam* of twenty Oxen and Cowes, and certain Quarters of Corne. And by *Belknap*, If he have the Manor and no Goods, yet he shall account for the Manor, and it shall be no Plea to say, That the Plaintiffe sold him the Goods without Traversing, without that, that he was his Bailiffe to render Account; and as to the Manor, he may say, That the Plaintiffe leased the same to him for years, without that, that he was his Bailiffe. And he took another Exception, That the Plaintiffe chargeth him with Monies *ad Merchandizandum*; and he Traverseth that he was not his Receiver *denariorum ad computandum propt*. And so he doth not meet with the Plaintiffe, and so it is no issue; and if it be no issue, it is not helped by the Statute of *Jeofailles*, 32. *H.* 8. but mis-joyning of Issue is helped by that Statute. 19. *Eliz. W.* Attorney of the Common Pleas did charge another Attorney of the same Pleas with a Covenant to have three years board in marriage with the Defendants Daughter; and he pleaded, That he did not promise two years board, and so issue was joyned and tryed; and the same could not be helped by the Statute, because it was no issue, and did not meet with the Plaintiffe. So if one charge one with *debet & detinet*, and he answer to the *debet* only, it is no issue, and therefore it is not helped. In 29. *H.* 6. in Trespasse for entring into his house and taking of his Goods, the Defendant pleaded *non intravit*, and the issue was tried, and Damages given; and because the taking of the Goods was not also in issue, all was void, 4. *E.* 3. One shall not account by parcells, because the Action is entire. *Vid.* 3. *E.* 3. 8. *acc. lib. Deme.* 202. A President 14. *H.* 7. That the Verdict was not full, and did not go to the whole, and therefore was not good. *Hele* contrary. And he said, as to the first, That there is a Case 9. *E.* 3. *Accompt* 35. Where the Plaintiffe chargeth the Defendant in Account as Bailiffe of his house, and that he had Administration of his Goods, viz. forty Sacks of wool: And the Jury found that he was not Bailiffe of his house, but they found that he had received the Sacks of Wooll to render account, &c. and he had judgement for the Goods, although it was not found for the house. *Vide* 5. *H.* 7. 24. *a.* Where if a Jury be charged with several issues, and the one is found, and the other not, it makes no discontinuance; or if one be discontinued, yet it is no discontinuance of the whole. But if the same be not helped by the common Law, yet it is helped by the Statute of 32. *H.* 8. which sayes, *Non obstante* Discontinuance

nuance or miscontinuance. *Daniel ad idem.* And he said, That the books before of 14. *H. 4.* and 49. *E. 3.* were not ruled; in the one book, the Defendant pleaded, That the Plaintiff gave the goods to him; in the other, that he sold them to him, and demanded Judgement of the Action; and it is no good answer, for they are Pleas only before the Auditors, and not in an Action of Account; and although the Verdict be found for part only, yet it is good, for no Damages are to be recovered in an Account. In Trespasse it is true; if one be found and not the other, and joint Damages be given, the Verdict is naught for all; but if severall Damages be given, it is good, as it is ruled in 21. *H. 6.* *Cook 26. H. 8.* is, That he cannot declare generally of an house, *curam habens & administrationem bonorum*; but he ought further to say, viz. Twenty Quarters of Corn, and the like, &c. In the Principal Case it is a joint charge, and one charge for the Shop and Goods, and he answers unto one only; but he ought to answer to all; or else it is no answer at all: See 10. *E. 4. 8.* But *Cook* found another thing, *scil.* That there is a thing put in issue which is not in the Verdict, nor found, nor touched in the Verdict; and that makes all that which is found, not good, and that is not helped by any Statute. I grant that discontinuances are helped by the Statute of 32. *H. 8.* of Jeofailes, but imperfections in Verdicts are not helped. It was a great Case argued upon a Writ of Error in the Exchequer Chamber; and it was *Brache's* Case. An Information was against *Brache* for entring into a house and one hundred Acres of Land in *Stepney*; he pleaded, Not guilty; the Jury found him guilty for the one hundred Acres, and said nothing for the house; upon which Error was brought, and the Judgement reversed; and he said, That it was not a discontinuance; but no Verdict for part. *Daniel.* That was the fault of the Clark, who did not enter it; and it hath been the usage to amend the default of the Clark in another terme. All the Justices said, True, if the *Postea* be in, and not entred: but here it is entred in the Roll in this forme. *Daniel,* Where I charge one in Accompt with so much by the hands of such a one, and with so much by the hands of such a one; although there be one *abſq̃ hoc* to them all, yet they are severall issues. The Court answered, Not so, unlesse there be severall issues joyned to every one of them. But by *Gandy* Justice, If there be severall issues, yet if one be found and the other not, no Judgement shall be given. *Clenche* Justice, It is not a charge of the Goods, but in respect of the Shop, therefore that ought to be traversed. *Suit* Justice, The traverse of the Shop alone is not good. The Queens Solicitor said, That the books might be reconciled, and that there needed not a traverse to the goods, for the traverse of the Shop *propt* answers to all: but now he charges him as Bailiffe of his Shop and Goods, and he takes issue upon the Goods only, which issue is not warranted by the Declaration. And

he said, That if one charge me as Bailiffe of his Goods *ad merchandizandum*, I shall answer for the encrease, and shall be punished for my negligence. But if he charge me as his Receiver, *ad computandum*, I shall not be answerable but for the bare money, or thing which was delivered.

Mich. 28, 29. Eliz. in the King's Bench.

70 G I L E ' S Case.

A Writ of Error was brought to reverse a Judgement given in an Action upon the Case. The Action upon the Case was brought against one, *Quare exaltavit stagnum, per quod suum pratum fuit inundatum*; and he pleaded Not guilty; and the Jury found *Quod erexit stagnum*; and if *Errelio* be *Exaltatio*, then the Jury find, that the Defendant is guilty; and thereupon Judgement was given for the Plaintiffe. *Glanville* alledged the generall Error, That Judgement was given for the Plaintiffe, where it ought to have been given for the Defendant. And he said, That *erigere stagnum, est de novo facere: Exaltare, est erectum majoris altitudinis facere; Decaltare is ad pristinam altitudinem adducere: prosternere stagnum, est penitus tollere.* And the precise and apt word according to his Case, in an Action upon the Case, ought to be observed; that he may have Judgement according to his damage and his complaint, viz. either *Decaltare* or *Posternere*, &c. 7. E. 3. 56. An Assize of Nufans, *Quare exaltavit stagnum ad nocumentum liberi tenementi sui*; The Defendant pleaded, That he had not inhaunced it after it was first levied. And by *Trew*, There is not any other Writ in the Chancery, but *Quare exaltavit stagnum*. *Herle* said, That he might have a Writ *Quare levavit stagnum*; and there by that book *Levare stagnum, & exaltare stagnum* do differ: And therefore he conceived, That the Writ should abate, for using one word for another, 8. E. 3. 21. *Nufans* 5. by *Chauntrell*. In a Writ of *Nufans Quare levavit*, if it be found that it was tortiously levied, the whole shall be destroyed: But in a Writ *Quare exaltavit*, nothing shall be pulled down if it be found for the Plaintiffe, but the inhauncing shall be abated only: So 8. Ass. 9. *Br. Nufans* 17. the same Case and difference is put, and 16. E. 3. *Fitz. Nufans* 11. If the *Nufans* be found in any other forme then the Plaintiffe hath supposed, he shall not recover. And in 48. E. 3. 27. *Br. Nufans* 9. The Writ was *Quare divertit cursum aque: &c.* and shewed that he had put Piles and such things in the water, by which the course of the water was streitned; wherefore, because he might have had a Writ *Quare coarctavit cursum aque*, the Writ was holden

den not to be good. *Cook* took another Exception, viz. That the Assize of Nufans ought to be against the Tenant of the Free-hold, and therefore it cannot be (as it was here) brought against the Workmen, and it is not shewed here, that the Defendant was Tenant of the Soil; for 33. H. 6. 26. by *Meile*, If a way be streitned and impaired, an Action upon the Case lieth; but if it be altogether stop'd, an Assize of Nufans lieth. But *Prisoit* said, If the stopping be by the Terr-Tenant, an Assize of Nufans lieth; but if it be by a Stranger, then an Action upon the Case; but for common Nufanses no Action lieth, but they ought to be presented in the Leet or Turne. *Drew*, We have shewed That he who brought the Assize of Nufans hath a Free-hold in the Land; and if the Tenant be named, it is sufficient, although it be not shewed that he is Tenant of the Free-hold. And to that, all the Justices seemed to incline. But then it was shewed to the Court, that one of the Plaintiffs in the Writ of Error had released: And if that should bar his Companions, was another question? And it was holden, That the Writ of Error shall follow the nature of the first Action; and that Summons and Severance lieth in an Assize of Nufans; and therefore it was holden, that it did the like in this Action; therefore the Release of the one was the Release of the other. But then it was asked by *Glanville*, What should become of the Damages, which were entire? Note, *Pasch. 29. Eliz.* the Case was moved again, and *Drew* held *exaltare* and *erigere* all one; and that *erigere* is not *de novo facere*, for that is *Levare*. But the Justices were against him, who all held, That *erigere* is *de novo facere*, and *exaltare* is *in majorem altitudinem attollere*, and at length the Judgment was affirmed, That *Erectio* and *Exaltatio* were all one: For the Chief Justice had turned all his Companions when he came to be of Opinion, that it was all one. And so the Case passed against *Glanvilles* Client.

Mich. 28, 29. Eliz. in the Kings Bench.

71

THE Lady *Gresham* was indicted for stopping the High-way; and the Indictment was not laid to be *contra pacem*. And *Cook* said, That for a mis-feasance it ought to be *contra pacem*; but for a non-feasance of a thing, it was otherwise; and the Indictment was for setting up a gate in *Osterly Park*: And Exception also was taken to the Indictment for want of Addition; for *Vidua* was no Addition of the Lady *Gresham*; and also *Vi & armis* was left out of the Indictment: And for these causes she was discharged, and the Indictment quashed.

Mich. 28, 29. Eliz. in the King's Bench.

72.

IN an *Ejectione firme*, Exception was taken because the Plaintiffe in his Declaration did not say, *Extra tenet* : For in every Case where a man is to recover a possession, he ought to say, *extra tenet*. And in Debt he ought to say, *Debet & detinet* : And in a Replevin, *Averia cepit, & injustè detinet*. But all the Justices agreed, That in an *Ejectione firme* those words were not materiall : For if the Defendant do put out the Plaintiff, it is sufficient to maintain this Action. And Kempe Secondary, said, that so were all the ancient Presidents ; although of late times it hath been used to say in the Declaration, *Extra tenet* : and the Declaration was holden to be good without those words.

Mich. 28, 29. Eliz. in the King's Bench.

73

IN a Case for Tithes, the Defendant did prescribe to pay but *ob. q.* for the Tithes of all Willows cut down by him in such a Parish. *Cooke*, It is no good prescription ; for thereby, if he cut down all the Willows of other men also, but *ob. q.* should be paid for them all. But he ought to have prescribed for all Willows cut down upon his own land, and then it had been good : But as the prescription is, it is unreasonable ; and of that opinion was the whole Court.

Mich. 28, 29. Eliz. in the King's Bench.

74 DEIGHTON and CLARK's Case.

IN an Action of Debt upon a Bond, the Condition of the Bond was, That whereas the Plaintiff was in possession of such Lands, If *I. S.* nor *I. D.* nor *I. G.* did disturb him by any indirect means, but by due course of Law, that then, &c. The Defendant pleaded, That *nec I. S.* *nec I. D.* *nec I. G.* did disturb him by any indirect means, but by due course of Law. *Godfrey*, The plea in Bar is not good : for it is a Negative *pregnans*, viz. such a Negative which implies an Affirmative, which yet seems to be repugnant to a Negative, as in 21. H. 6. 19. In a Writ

Writ of *Entrie*, the Defendant pleaded the deed of the Demandant after the *darrein Continuance* : The Demandant said, It was not his deed after the *darrein Continuance* : And that was holden a Negative *pregnans* : wherefore he was compelled to plead and say, he made it by *dures*, before the *darrein Continuance* such a day, *absque hoc*, that he made it after the *darrein continuance*, and then Issue was taken upon it. The same Case is in 5. *H.7.7.* But there it is said, That in Debt upon a Bond to perform an Arbitrement, *Non fecerunt Arbitrementum per diem* is no Negative *pregnans* : The same Law, that *non deliberavit arbitrium in Script.* 38. *H.6.* in *Formedon Ne dona pas* in taile is a Negative *pregnans.* *Vide* 39 *H.6.* The Case of the Dean and Chapter. The second Exception was, That he hath pleaded *neque* such, nor such, nor such had disturbed him by any indirect means, but onely by due course of Law : And that cannot be tryed, neither by Jury, nor by the Judges. Not by the Jury; because it is not to be put to them, whether they had disturbed him by indirect means, or by due course of Law : for they shall not take upon them the construction, What is an indirect means, and what is the due course of Law; for it appertaineth to the Justices to adjudg that. Not by the Judges, because hee hath not put it certain, that it was a due course of Law by which he disturbed him. As 22. *E.4.40.* In Debt upon a Bond, the Defendant saith, that it is upon condition, That if the Defendant, or any for him, came to *Bristow* such a day, and there shewed to the Plaintiff or his Councell a sufficient Discharge of an Annuity of forty shillings *per annum*, which the Plaintiff claims out of two Messuages of the Defendant in *D*, that then, &c. The Defendant said, that *A.* and *B.* by the assignement of the Defendant, came the same day to *Bristow*, and tendered to shew to *N.* and *W.* of the Plaintiffs Councell, a sufficient Discharge of the Annuity, and that they did refuse to see it, and demanded judgment of the Action. The Plaintiff did demur upon the Plea. And after a long argument, it was adjudged by all the Justices to be no Plea, &c. because it lay in the judgment of the Court to judg of it : and he did not shew in certain, what discharge he tendered, as a Release. Untie of possession, &c. If a man be bound to plead a sufficient plea before such a day, in Debt upon such a Bond; it is no plea to say, That he hath pleaded a sufficient plea before the day; but hee ought to shew what plea he hath pleaded : For the Court cannot tell whether it be a sufficient plea or not, if it do not appear what manner of plea it is. 35 *H.6.19.* The Condition of a Bond was, That where the Plaintiff was indebted to *J. S.* in one hundred pounds; If the Defendant acquit and discharge the Plaintiffe, that then, &c. The Defendant pleaded, That hee had discharged him &c. and the Plaintiffe did demurre upon the plea, because hee did not shew how; and it was holden no good plea. So 38. *H.8. Br.*

Condition 16. per curiam in the Kings Bench; where a man pleaded, That he had saved him harmlesse; it was no Plea, without shewing how, because he pleaded in the Affirmative; contrary, if he had pleaded in the Negative, as *Non damnificatus est*. *Suii* and *Clenche* Justices said, That if he had pleaded, That he was not disturbed by any indirect means, it had been good enough. *Gandy*, If he had said, That he was not disturbed *contra formam conditionis predictæ*, it had been good; as upon a pleading of a Statute, *Ne contra pac contra formam Statuti*. *Clench*, If I be bound to suffer *1 S.* to have my house, but not *I. D.* I ought to answer, That I have suffered the one, and not the other to have it. *Suii* Justice, They are both severall issues, and one shall not be repugnant to the other.

Mich. 28, 29 Eliz. In the Kings Bench.

A Case was moved upon the Statute of *5. Eliz. Cap. 14.* The Case (as I conceive) was thus: Grandfather, Father and Daughter; Land descended from the Grandfather to the Father, who made a Lease for one hundred years; the Father died, and the Daughter forged a Will of the Grandfather, by which he gave the Land to the Father for life, the Remainder to the Daughter in Fee; and the same was forged to have avoided an Execution of a Statute Staple, the Lease being defeated; and if it were within the Statute of *5. Eliz.* was the question. Solicitor, That it was within the statute, and within the first Branch; viz. If any shall forge any deed, &c. to the intent that the Estate of Freehold, or Inheritance of any person, &c. in or to any Lands, Tenements, or Hereditaments, Freehold or Copyhold, or the right Title or Interest of any &c. of, in, or to the same, or any of them; shall or may be molested, &c. Lessee for years hath a Title, hath an Interest, hath a right; therefore within the words of the Statute; and those words shall be referred to the words Lands, Tenements, &c. But *Cook* said, They shall be referred to the words precedent, viz. Estate of Freehold or Inheritance; and then a Lease for years is not within them. Also by the Solicitor, A Testament in writing is within the words of the Statute, and therefore he recited a clause in the end of the Statute; viz. and if any person plead, publish, or shew forth, &c. to the intent to have or claime thereby any Estate of Inheritance, Freehold, or Lease for years: And also he said a Statute Staple is an estate for years, although it be not a Lease for years, because it is not certain. *Cook*, If she should be within both branches, then she should be twice punished, which the

Law will not suffer. And the Statute is, whereby any Estate for years shall be claimed; and she would not claim, but defeat an Estate for years; and a Statute Staple is not a Lease for years; and the Statute is not to be taken by Equity, because it is a Penall Law. Solicitor, When the Statute is extended, then it is an Estate for years, although it be uncertain. If a man forge a Lease for years, it is directly within the Statute. But if a man have a Lease, and another is forged to defeat it, it is a question whether it be within the Statute: And all the doubt of this Case is upon the reference of these words, Right, Title, Interest: And it was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

76

THE Vicar of *Pancras* Case was argued again by *Godfrey*: And he said, That no Plea shall be allowed in the Ecclesiasticall Court which tends in discharge of Tithes: And to prove that, he cited 8.E. 4. 14. *Br. Tithes* 11. And a Case in 6. & 7. E. 6. *Dier* 79. d. But admit the Plea should be allowed in the Ecclesiasticall Court (as many of the Doctors have certified the Justices) yet because the *Modus decimandi* is a thing pertaining to the common Law, the Prohibition will lie. By *Fitz. Herb.* and the Register, If a Parson grant to one of his Parishoners, That he shall be discharged of Tithes, he may peradventure plead the same in the Spirituall Court, yet there is good cause that a Prohibition do lie: So 22. E. 4. 20. *Br. Prohibition* 14. The Abbot of Saint *Albans* kept the wife of *I. S.* in his house two houres against her will, to have made her his Harlot, and the Husband spake of it; for which cause the Abbot sued him for slander in the Spirituall Court; and because the husband for that act might have a false imprisonment, therefore a Prohibition was granted. So if I swear to pay *I. S.* 10^l. and he sues for it in the Spirituall Court, a Prohibition lieth; for hee may have an Action of Debt in the common Law for it; for where the common Law may have Jurisdiction, there the Spirituall Court shall not intermeddle with the matter. So if an Abbot rob *I. S.* and he speaks of it, and the Abbot sues him in the Spirituall Court, a Prohibition will lie. He said further, That the Case was betwixt the Vicar and a Parishoner, and therefore one of them a Temporall person. If the Suit be betwixt the Farmer of the Parson and another, a Prohibition shall be granted. Also he said, The right of the Tithes doth not come in question, but only the *Modus decimandi*. *Cock*, The *Modus decimandi* doth not come in question there, therefore it cannot be traversed; for if it be due to the Parson, that is the question, as in 40. E. 3, 4. In a

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Replevin, the Defendant saith, That the place where &c. is Ancient Demesne, and pleads to the Jurisdiction; *Chart'*, that is a Trespasse, and Personall Action, and therefore it is no plea; and yet it was agreed by the Court to be a good plea: for by the Avowry, the realty might come in debate in the Replevin, *Atkins*, If there be contention *de jure Decimarum Originum, habens de jure Patronatus, tunc spectat ac Legem Civilem*. And in this case, it was said, That *de mero jure*, The Parson is to have all the tythes, if there be not any Endowment of the Vicarage.

Mich. 28, 29. Eliz. in the Kings Bench.

77. MEGOD'S Case.

THE Case was, That a Feoffment was made unto another man, *ad eam intentionem*, that he should convey the same to such a one, to whom he sold it; and he sold the same to another, and did refuse to convey it; and therefore the other brought an Action upon the Case. And *Gaudy* Justice held, that the Action would lie. But *Smit* Justice held the contrary. *Wray* Chiefe Justice did agree with *Gaudy*: for he said, It was a Trust, that he should assure it to another. And it is a good consideration in the Chancery: the conveyance of a Trust, and thereupon, an Action upon the Case will lie.

Mich. 28 & 29 Eliz. In the Kings Bench.

78.

A *Ltham* of *Grays-Inne*, took many Exceptions to an Indictment of Murder. The first was, because the Indictment said, *Quod capta fuit inquisitio coram Coronatore in Comitatu, &c.* and doth not say, *de Comitatu*. And a Crowner in a County is a Crowner in every County in England, as it is holden, 9. H. 5. 24. b. Also *de* and *in* do much differ, as in 15. E. 4. 15. Where a *Scire facias* was brought against the Master and Scholers *Beata Maria, & Sancti Nicholas in Cantabrigia*, where the foundation was *de Cantabrigia*, and not in *Cantabrigia*. And the Writ was abated: For there is a difference betwixt [*in*] and [*de*.] For a thing may be [*in*] and not [*of*.] as *Saint Sepulchres* is in *London*, but not *of London*. A second Exception was, because it said, *Inquisitio capta per Sacramentum, &c.* and did not say, *Jurati*; and therefore the partie is not charged upon it; and by 13. E. 4. If the

Jury be charged upon one, and they find another felon, it is void; because they were not charged upon him. And 1. R. 3. 4. by *Hassley*. If in Assize the Record be such, viz. *Quod jurati exalti compertuerunt, quorum 12. supra Sacramentum suum dicunt*, And give their verdict, If it doth not say, *Quorum 12. Electi & jurati*, it is error. For it doth not say *in facto*, that they were sworn, and yet it is implied by the words *Sacramentum suum*, that they were sworn. The third Exception was, That it doth not say, That he was *in pace Dei*, & *dicta Domina Regina*; for it might be that the partie was a Traitor, and that he was flying, and in such case he might justifie the killing of him; and perhaps also it was *se defendendo*; therefore those words are very necessary. An other Exception was, because the Indictment is, *percutit*, and it is not said, *ex malitia praecogitata*, for so an Indictment of Murder ought to be, as in 2. E. 4. The Indictment was, *quod Cepit & abduxit felonice*, where it ought to have said, *Felonice cepit & abduxit*; and therefore it did abate. A fifth Exception was, because it saith, *Et dedit ei plagam mortalem*; and doth not say, *cum gladio predicto*. And in the Statute *de Coronatore*, there is a charge given him, That hee finde what weapon it was which gave the stroke. See the Statute of 4. E. 1. *Rastall Coroners*. 2. The sixth Exception was, That the Indictment was, That the pan of the knee was cut out, and it doth not shew, the length, depth, and breadth of the wound: he granted that if one single member be cut off, it is not necessary to shew the breadth, &c. but here was no amputation of any member, nor a cutting off, but the cutting of the pan of the knee. *Snag* to the same purpose, and he finds there is a great difference betwixt cut off, and cut out. And he said, That as to that which the Solicitor hath answered unto, to the difference of [*in*] and [*de*], viz. that it is all one, as if I grant a thing *percipiend' de Manerio*, or *in Manerio*, that is all one. To that he answered, that that cannot be; and in *Wimbishes* case, in *Plo. Com.* 75. the same Exception was taken in a Writ. But in our Case, he said, It is an Indictment, which is favoured, because the life is in question. And he took another Exception, because that the Indictment saies, *Tempore felonie & muredredi predicti*, and there is no such word *muredredum*: To that the Solicitor said, That it was in equall degree, *mur-dum* and *muredredum*, for none of them are found amongst the Latins. *Snag* said, What then? yet one is a word which is received in the Law, and is *vox artis*, but the other not; and therefore it is not in the same degree. Also he said, That when the Indictment comes to the Accessories, It said, *Felonice presentes, abbetrentes, & assistentes*: and *felonice* cannot be applied to (*praesente*.) Also when it comes to the Accessories, it doth not say, *Ex malitia praecogitata abbetrentes & assistentes*, &c. Cook contrary; and he said, That if Indictments have sufficient substance, they are not to be overthrown for trifles: As to

the first he said, If you will have it to be (*coram Coronatore de Comitatu*;) perhaps it was a Liberty; and then *coram Coronatore* of the Liberty, cannot be *coram Coronatore* of the County. Gandy Justice said, that was no answer. But as to this point, the Justices desired that Presidents might be searched; and said, that they would follow the greater number of them. *Clonche*, If one say, that such a one is a Justice of Peace in *Hertfordshire*; it is all one, as if he had said a Justice of Peace of *Hertfordshire*. As to the 2^d *Jurati*, that is no Exception; for it is true, that it must be so in an Assize, but not in an Indictment: also no President can be shewed, where *ex malitia propensa sua* shall be applied to every word, when it runs in sense to all by Conjunctions copulative. As to the Exception, that there ought to be the length, breadth, &c. *Kempe* the Secondary said, That it was not worth the standing upon: and as to the word *Murdredi*, if it had been left out, the Indictment had been sufficient, and that shall not make the Indictment void; for if it be left out, it doth no hurt to it: For if many come together to make an Assault, *ex malitia praecogitata*; and one of them onely strikes the partie mortally, and he dieth, it is murder in them all. And that was Doctor *Ellis* case in the Commentaries; and the Indictment needs not say, that they were *praesentes, abstantes & auxiliantes*: and as to the word *felonice*, it goes to all the words, although not particularly applied. Note, all the Justices did incline that the Indictment was good notwithstanding the Exceptions; but yet they said, they would advise of it, and look upon Presidents.

Mich. 28, 29. Eliz. in the King's Bench.

79.

A Writ of Error was brought against two, upon a Recovery in a *Precipe quod reddat*, &c. and one of them died. The question was, Whether the Writ should abate? *Cook* moved, that it might not abate; for he said, That the Writ of Error is but a Commission for to examine the Record, and the partie shall recover nothing thereby, but shall be onely discharged from the first Recovery: and he said, It is not like unto a *Precipe*. Then the Justices demanded of him, if the Recovery were in a reall Action; and he said, that it was: Then they said, that 3. H. 7. 1. is, That if Error be brought upon a Recovery in a personall Action, that death shall not abate the Writ; but otherwise, if it were upon a reall Action: for there the Judgement shall be, that he shall be restored to the Land. *Quere.*

Mich.

Mich. 28, 29. Eliz. in the King's Bench.

80

AN Appeal of Mayheme was, that *Percussit super manum dextram* viz. *inter manum dextram & brachium dextrum*. And Excepti-
on was taken to it, that it was repugnant; for if it was *inter brachium*
& *manum dextram*; therefore it could not be *super manum dextram*;
for the word [*inter*] excludes both. *Cook*; It is certain enough,
because it saith, *Super manum dextram*. And an Indictment shall not
abate for forme, if it be sufficient in substance of matter; and also be-
ing upon the Wrist, it was upon the rising of the hand.

Mich. 28, 29 Eliz. in the King's Bench.

81

A Man made a Lease for years, rendring rent at the Feast of Saint
Michael th^r Arch-Angel; and if it were behind by ten days after,
being in the mean time lawfully demanded, and no sufficient distresse
to be found upon the Land, that then it might be lawfull for the Les-
sor to re-enter. The last of the ten dayes at the hour of two afternoon
the Rent was demanded, and there was a sufficient distresse upon the
Land before the Demand, but not after; and whether the Lessor might
enter or not? was the question. *Daniel*; These words [Sufficient di-
stresse] ought to be referred to the time of the Demand, viz. to
the last instant at which time the Demand is only materiall: Upon a
Cessavit, if there be a sufficient distresse, the last instant of the two years;
it is sufficient. *Clenche* Justice held, That there ought to be a suffici-
ent distresse upon the Land for all the ten dayes. But *Swit* Justice held.
That it was sufficient if there were a distresse for a reasonable time, so
as it might be presumed, that the Lessor might have knowledge of it.
But if a distresse be put upon the Land only for an hour, or by nights,
he held it was not a sufficient distresse.

Mich. 28, 29. Eliz. in the Kings Bench.

82 SIR EDWARD HOBBYE'S Case.

IN this Case the question was, Whether the Death of one of the Defendants, should abate the whole Writ of Error. *Cook*, The Writ shall not abate, for no Defendant is to be named in the Writ; which see in the forme of the Writ of Error; and *2.R. 3. 1.* it is holden, That the Writ shall not abate, for it is in its nature but a *Certiorari*, and Judgement only is to be reversed. *Atkins*, Although that the Defendants have not day in Court by the Writ of Error, yet by the *Scire facias* which is sued upon it, as in our Case it is, they have day; and see *3. H. 7.* and *14. H. 7.* a difference, where it is a Writ of Error upon a reall Action, and where upon a personall. *Cook*, That holds, Where the first Writ is abated, and so is *3. H. 7.* See the Case a little before, *Gandy* and *Clench* Justices, bring a new Writ of Error for that is the surest way.

Mich. 28, 29. Eliz. in the King's Bench.

83 LOVELL and GOLSTON'S Case.

IN a Writ of Error brought upon a Record removed out of the Court of *Kingston*, where the first Judgement was given in an Action of Debt for an Amercement in a Court Baron: The first Error which was assigned, was, That he in the Action of Debt did declare, That whereas at a Court holden before *William Fleetwood* Steward, *Sic* whereas it ought to have been holden before the Suitors, for they are the Judges. The second Error was, That the Presentment upon which the Amercement is grounded, saith, That *Golston* the Defendant had cut down more Trees *quam debuit, extra boscum Domini.* 1. That it is repugnant; for he could not cut wood *extra boscum*, but *in bosco.* 2. When it saith many, and doth not shew what trees; nor how many he might cut, and that he hath cut down more then he ought, and also he doth not shew when the cutting of them was. *Vide 6. E. 4.* By prescription they may prescribe to hold a Court before the Steward; but if there be no custom or Prescription to warrant it, then as *4. H. 6.* is, it is *coram Senescallo, & Sessoribus.* *Gandy*, Every Court Baron is to be holden before the Suitors, if there be no Prescription to the contrary: But a
Leet

Leet always before the Steward. The Action of Debt was upon the Presentment; and the Error is brought upon the defects in the Presentment; for if that be not good, all is naught. Notwithstanding it was said by one at the Bar, That the forme of pleading in the book of Entries is, That the Court was holden before the Steward, if the Action be for debt or Trespass for Amercements or such personall things: But if the Action be brought for reall things, then it is before the Suitors. But notwithstanding that, the Judgement for the Causes aforesaid was reversed.

Mich. 28, 29. Eliz. in the Kings Bench.

84

BARKER and FLETWEL'S Case.

Barker of Ipswich brought an Action of Covenant against the Assignee of his Lessee for years, one Fletwel. And set forth, That whereas he had made a Lease for years reserving Rent, with re-entry for non-payment of the Rent; and that the Lessee did covenant to build a house upon the Land within the first ten years; and that he assigned over his terme: And he brought the Action against the Assignee, who pleaded, That the Lessor did enter, and had the Possession for part of the ninth year; and if thereby the Covenant were discharged, was the demurrer in Law. *Godfrey*, Who argued for the Lessor, said, That by this entrie of the Lessor, the Covenant was not suspended. As 20. E. 4. 12. *Br. Extinguishment* 34. The Abbot of *D.* did grant to *W. S.* a Corrodie; viz. so much bread, &c. for the term of his life, *faciend² talia servitia prout J. N. & alii usi sunt facere*; The Grantee leased back again the Corrodie unto the Abbot for 10. years, rendering 3^l. rent *per annum*, and he brought Debt for the rent; and the Abbot said, That he did not the Services; and the Grantee said, That he was not bound to do them, for that by the Lease the Corrodie was suspended: And it was holden, that it was not suspended. *Godfrey* held the reason to be, because that the service is a Collaterall thing: And therefore he said, He ought to do it, notwithstanding that the Abbot had the Corrodie: So in 8. H. 7. 7. *Br. Conditions* 134. Where Tenant in taile makes a Feoffment in Fee, and takes back an estate in Fee, and afterwards was bounden in a statute Merchant, and then made a Feoffment in Fee upon Condition, and died, his Issue within age, who enters for the Condition broken; he was remitted notwithstanding that execution upon the statute was sued against the Father in his life. So if Lease be made of a Manor, except Herriots, Fines, and Amercements; and that the Lessee shall collect them during the Term,

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although that the Lessor entred, yet the Lessee ought to collect them during the term. Also he pleades here, That *Barker* did enter, and that generall pleading is doubtfull; and the Plea shall be taken strictly against him that pleadeth it; and it may be that he entred by wrong; and so it may be that he entred by right, viz. for not payment of the Rent, as in truth his entry was: And if *Barker* did enter lawfully, then it was no suspension or extinguishment of the Covenant: As 19. R. 2. If Lessee for life commit waste, and afterwards alieneth, and the Lessor entred for the Alienation, yet after his entry he shall have an Action of Waste against the Lessee: So 8. H. 6. 10. *Waste* 8. but with this difference, If the Lessor enter wrongfully, there, although Waste be done before, he shall not have Waste to punish it; but otherwise if he enter for the Forfeiture done by the Tenant. Also if the Covenant was suspended, it was only for the time that the Lessor had the Possession, and the Party hath not answered for the time before or after. As 16. H. 7. If one be bound to find a Chaplain to say Divine Service within such a Chappel, and the Chappel fall down, it is a good excuse for the time; but if it be built again, he must find a Chaplain there. *Clarke* contrary; If Lessee for years covenanteth to repair the houses, I grant that the same shall charge his Assignee. But a Collateral thing, (as if the Lessee covenant to pay such a sum in gross, or to enfeoffe him of the Manor of *D*.) the same shall not charge the Assignee; no more shall a Covenant to build a new house: But here it was said, That he had time to build it both before and after the entry of the Lessor *Barker*. To that he answered, Not so; for if he once disturbed, the Covenant is destroyed. *Godfrey*. This Case was this Terme in the Common Pleas. Lessee for five years covenanted to build a Mill within the terme; and because he had not done it, the Lessor brought an Action of Covenant, and the Defendant pleaded, That within the last three years, the Lessor forcibly held him out, &c. so as he could not build it; and by the Opinion of all the Justices, he ought to plead, That the Lessor with force held him out, otherwise it would be no Plea. *Cook*, As *amicus curia*, vouched 35. H. 6. *Tir. Barr*. If one be bounden to enfeoffe me of such land before *Michaelmas*, there the Obliger in Debt brought upon the Bond, pleaded, That the Obligee (before the day) had entred with force into the land, so as he could not enfeoffe him; and there it was holden, That he ought to prove that he was holden out by force. *Gandy*, In the principall Case he ought to have shewed, That he would not suffer him to build: And the other Justices seemed to be of the same Opinion; but yet they said, That they would advise upon the Case.

Spencer's case
Coke. li. 13.

Micb. 28, 29. Eliz. in the Kings Bench.

85

Owen took Exception to a Declaration in an *Ejectione firme*, because it was à *Possessione sua ejecit*; where it ought to be, according to the supposal of the Writ, *Quod à firma sua ejecit*. Also it was of three closes, naming them with a *Fidelicet*, containing, by estimation, 30. Acres; and that, he said, did contain no certainty; where he ought to have alledged in Fact, that they did contain so many Acres. But it was holden by all the Justices, That although he doth not put in the Declaration the certainty of the Acres; if he give a certain name to them, as Green-Close, &c. that it is good. And as to the other Exception, viz. *Ejecit à Possessione [inde]*, that the word [*inde*] had relation to the Farme; and shall be as much as if he had said, à *Possessione firme*; and the Declaration was ruled to be good, notwithstanding the Exceptions.

Micb. 28, 29. Eliz. in the Kings Bench.

86

A Man was indicted upon the Statute of 5. *Elizab.* of Perjury, in a Court Leet; and the Indictment was, That hee at the Court Leet of the Earle of *Bath*, *Super Sacramentum suum coram Senescallo, &c.* And Exception was taken, because it said, At the Leet of the Earle of *Bath*, Whereas every Leet is the King's Court, although that another hath the profit and commodity of it: And it was said, That the Steward of a Leet was an Officer of Record; And also his Oath was, if he had made any *Rescous* or not, with which he was charged. *Drew.* It is not within the Statute of 5. *Eliz.* for then it ought to be before a Jury in giving of Evidence, or upon some Articles: But the Court was clear of Opinion against him.

Micb.

72 The Earle of K. and Smith & Smith's Case.

Mich. 28, 29. Eliz. in the Kings Bench.

87 The Earle of KENT's Case.

THE Case was this, Three severall persons did occupie three severall houses in *Brackley*, to which another man had right; and he who had right, went to one of the houses, and entred, and afterwards went away, leaving him who occupied the said house upon the land; and then he entred into another of the houses, and then went from that, leaving him who occupied the same before, upon the land; and then he entred into the third house, and there sealed a Lease for years unto another man of that house, and naming the two other houses; and the Lessee brought an *Ejectione firme* for the two houses in which the Lease was not delivered, and the Opinion of the Court was against him, that he was barred in the Action; for the entrie or continuance of him who occupied the same before, did defeat the entrie of the Plaintiffe or Lessor; and the Plaintiffe was forced to be Non-suit.

Mich. 28, 29. Eliz. in the Kings Bench.

88 SMITH and SMITH's Case.

ONE *I. S.* did assume and promise, That whereas *I. N.* was indebted to *J. D.* in Forty Pounds by Bond, That if *J. D. ne implacitaret* the said *J. N.* that if the money be not paid such a day, that *J. S.* would pay it to *J. D.* The money was not paid: and after the day, *J. D.* brought an Action upon the Case, upon the promise, and shewed *Quod ipse non implecitavit, &c. Kingmill*, He cannot have his Action upon the Case till *J. N.* be dead, for during his life there is a time in which he might implead him. As if I promise unto another, That if he will be Nonsuit in his Action, which he hath against a third person, that if he doth not pay the money before such a day, that then he will pay the money there; if the day of payment be before the time that he can be Non-suit, as before the Terme beginneth, yet he cannot presently have his Action before that he is Non-suit. And therefore in the principall Case he ought to shew; That he hath discharged the other of the Bond, and then the Action lieth, for then he cannot implead him; but as this Case is pleaded, though he hath not yet impleaded

pleaded him, yet *in posterum* he may implead him. *Clench* Justice, That is implied, that he will never implead him, and then he ought to shew the Bond discharged. *Suir*, That is not so: for if hereafter he sue him against his promise, then the other to whom the promise was made shall have his Action upon the Case, and shall recover to the value of the sum in the Bond.

Mich. 28, 29. Eliz. in the King's Bench.

89 BILFORD and DODDINGTON's Case.

A Writ of Error was brought by *Richard Bilford* against *Robert Doddington*, to reverse a common recovery in the City of *Worcester*, upon a Writ of Right Patent: And for Error it was assigned; 1. That no Warrant of Atturney was entred, but that such a one *posuit loco suo W. H.* and did not write the name at length, but in the Plea Roll it was at length. The second Error was, That the Writ was, *De tribus messuagiis sive tenementis*, and that doth containe no certainty, for [*sive*] is a word uncertaine. The third Error: It was in the time *Philippi & Maria*, and *petis processum Domini Regis & Regina*: and it was *eorundum Regis*, and that was in the default of Voucher, that the Recovery was had; but if it were in the Recovery, in which he did appear and plead, it was otherwise. The Counsell of the other side, as to the first, said, That all the Records of the City are of the same form, viz. That such a one *Posuit loco suo W. H. &c.* and if it were not good, they should be all overthrown and avoided; and if it should be otherwise, it should be contrary to the ancient custome of the City. As to the second, *Quod petis processum eorundum Regis*, the same is the miscritall of the Clark; for the Writ upon which it is grounded is well; and as to the Process, the party did appear *gratis*. As to the word [*sive*] the same is good, for *tenementum* is but Surplusage; As in an Action of Waste, if the party do expresse some things which are not waste, and some things which are; those which are not waste, are but Surplusage. Also he said, That the Writ of Error by which the Record is removed, is insufficient; for the Writ is, That there is Error *manifestus*. and doth not say [*ut dicitur*] and therefore it is not good, for otherwise the King should forejudge us; And also in the Writ, it doth not say *Errorem si quis fuerit*; and it ought not precisely to say, That there is Error. Also the Writ of Error is to certifie a Record *de tribus messuagiis & tenementis*; and the Record is, *De tribus messuagiis sive tenementis*; and therefore the Record is not well removed; for it is not such Record. As

12. *Ass. 2.* in *Attaint*, Exception was taken, that the Writ of *Attaint* did not agree with the first original; but because it did agree with the Record, it was good, although it did not agree with the first Original; for the first Original was of the Manor of *Austi*, and the *Attaint* was of *Anefti*, and so was the whole Record. But if the *Attaint* had disagreed with the Record; it had been Error. Also the Writ was good, although *tenementum* were out of the Writ, for it is but surplusage. And also *Tenementum* is not a thing demandable; as 11. *H. 7. 25.* it is said, That *Tenementum* is not a name to demand a Messuage by: but in *Trespas*, of Nuisance to it, there *Tenementum* is sufficient. *Suit Justice*, The Record is now before us, and therefore the Writ of Error is not material: For if my Lord *Anderson* bring before us a Record, although no Writ of Error be awarded, yet wee may proceed to examine Whether there be Error in it or not. Also hee said, that the Warrant of Attorney was not good, although it was usuall, for that they ought to follow the course of the common Law. *Clenche Justice*, There ought to be Writ of Error before that any Judgement upon the Errors can be given for to reverse the first Record. The reason wherefore the certain name of the Attorney ought to be put, is, because if one appeare as my Attorney without my Authority, I may have my Action of the Case against him, which I cannot have against *W. H.* It was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

90 TAYLOR against REBERA.

Taylor brought an Action of Debt upon a Bond of 800^l, against *Rebera*; which Bond was endorsed with this Condition, That if the Plaintiff did bring such a Ship to such a place in *Greece*, and at the same place should stay for the space of forty dayes, or so long of the forty dayes as should please the Defendant, so as he might freight the Ship; the Defendant should freight the Ship within forty dayes, and should bring it to such a Port in *England*: And because he had not freighted the ship, and the ship was there by the space of forty dayes, he brought his Action upon the Bond: The Defendant pleaded, that within those forty dayes, viz. by the space of four and twenty dayes, the said ship was laden with Hoops, so as the Defendant could not freight it: And the Plaintiff did demurr in Law upon the plea. *Clark* for the plaintiffe: The Defendant hath not answered to all the time, but to part onely; and he had sufficient time, although the ship were laden with Hoops

Hoops for the space of four and twenty dayes: as 33. *H. 6. Barr.* 162. The Master of *S. Katherines* leased three houses by one Indenture, upon condition that the Lessee should not suffer nor harbour any lewd woman within the same houses, if he were warned thereof by the Master or his servant for the time, &c. And if he did not put her out within six weeks after such warning, that then it should be lawfull for the Master and his Successors to enter. And it was shewed, That the Lessee did suffer a lewd woman there to continue: wherefore such a one, servant of the Master, gave him warning, &c. and the Lessee did not put her out of the house, and that therefore the Master did enter: which matter, &c. The Lessee said, that after the said warning given, that the Master commanded her to enter, and to dwell there for six weeks after, without that, that she continued there by the Defendant. And it was ruled by the whole Court, that the Replication was not good, because the Indenture is, That he should not suffer any lewd woman, &c. As if I be bound to enfeoff you of an Acre of Land by such a time, within which time you disseise me, the same is no plea, for that the Feoffor hath not colour to enter; therefore I may enter upon him, and make the Feoffment. So in that case, the Master had no colour to put her into possession, therefore it was no plea, without shewing the speciall matter: Wherefore he said, That he did put her out, and that the Master with force, &c. against the will of the Lessee, did put her in; and there made her to stay with force and violence, against the will of the Lessee, for the six weeks &c. and that was holden to be a good plea. So in the principall case, he doth not shew, that he was kept out with force, but that he might cast out the Hoops; and therefore the plea is not good. So 3. *H. 4. 8. Br. Condition* 35. There was a Covenant betwixt the Lessor and Lessee, That the lessor during the lease might be four dayes in a yeer in the house without being put out, upon pain of one hundred pounds: and the Lessor came to enter, and the Lessee shut the doors and the windows; It was held, that was no breach of the Covenant, without saying, that the lessee put him out. *Atkins* contrary: The ship was to remain there to be freighted, for so many dayes as it should please the Defendant of the forty dayes for to freight her: therefore the first act is to arise on the plaintiffs side; and the same ought to be shewed specially to have been done. As 14. *H. 8. 18. Br. Condition* 42. Debt upon a Bond, upon Condition That if the Defendant resigne the Benefice of D. unto the Plaintiff upon a Pension, as they may agree by a certain day, That then, &c. The Defendant said, that he was always ready to resigne to him the Benefice, and yet is, in case the Plaintiff would assure him the Pension. It was no Replication for the Plaintiff, That he offered him a Pension, unlesse he shew, that he offered him a Deed thereof. So 33. *H. 6. A condition* was, That if I may enjoy such goods, I will give to you such a summe

of money; I ought first to enjoy the goods, before that I shall pay any money. Also in the principall Case, it is not shewed, That the ship was ready there by the space of forty daies; and it is a generall rule in Conditions, That if the Plaintiffe himselfe be the cause of Disablement, so as the Condition cannot be performed, that he shall not take advantage of a Condition; as in the Case of 9. H. 7. Where one is bounden to enfeoffe such a woman before such a day, and the Obligee before the day doth marry the woman: 35. H. 6. and 7. H. 4. If I be bounden to pay a pension to one, untill he be promoted to a Benefice, and he disables himselfe to take the Benefice, I shall no longer pay the pension. Besides, he said, That in the principall Case, the matter could not be tryed here; for the Jury cannot take notice of a thing done *ultra mare*: But 11. H. 7. 16. a difference is taken: If the thing be all to be done beyond the sea, then it cannot be tried here; but if part be to be done here, and part beyond sea; so as it is mixed, it may be tried here; As a Bond with condition, That if the Obligor bring the Merchandizes of the Obligee from *Norway* beyond the sea, to *Lynn* here, that then, &c. So contrary, If to carry goods delivered here, to *Burdeaux*, &c. It was adjourned.

Mich. 28, 29. Eliz. in the Kings Bench.

91.

SHOTBOLTS Case.

A Man brought an Action upon the Case against another, because he caused him to be indicted, and arraigned, &c. to his damage, &c. And it was for a robbery; and the Plaintiffe did not shew in his Declaration, that he was *legitimo modo acquietatus*; The Defendant by way of Barre said, That he was acquitted *modo & forma*, as the Plaintiffe had said; and in truth, he doth not say that he was acquitted. *Cook*, If the Declaration be insufficient, and wanteth substance, then there is no cause of Action. *Clench* Justice, A man shall not have an Action without cause; and if he were convicted, then there is no cause of Action: and he hath not shewed whether he was convicted or acquitted. And he said, that there was no difference betwixt an Action on the Case, and a Conspiracie, in such case, but onely this, That a Conspiracy ought to be by two at the least; and an Action upon the Case may lie against one; and he said, that in both, he ought to shew, that he was *legitimo modo acquietatus*. See 11. H. 7. 25. An Action of Conspiracy founded upon the Statute of 8. H. 6. Cap. 10. whereit is grounded upon a Writ of Treppasse brought against one onely; But such a Conspiracy which is grounded upon an

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Bonefant against Sir Richard Greinfield. 77

Indictment of Felony, must be against two at the least; for the same is an Action founded upon the Common Law.

Mich. 28, 29. Eliz. In the Kings Bench.

92. BONEFANT against Sir RIC. GREINFIELD.

Bonefant brought an Action of Trespasse against Sir Richard Greinfield: The Case was this: A man made his Will, and made *A. E. I. O.* his Executors, and devised his Lands to *A. E. I.* and *O.* by their speciall names, and to their heirs, and further willed that his Devisees should sell the Land to *I. D.* if he would give for the same before such a day an hundred pound; and if not, that then they should sell to any other to the performance of his Will, *scil.* the payment of his debts; *I. D.* would not give the hundred pound. One of the Devisees refused to entermeddle, and the other three sold the Land; and if the Sale were good, or not, was the question. *Cooke.* The Sale is not good. 1. Let us see what the Common Law is, At the Common Law it is a plain case, that the Sale is not good, because it is a speciall trust, and a joynt trust, and shall never survive: for perhaps, the Devisor who is dead, reposed more confidence in him who refused, then in the others. *Vide 2 Eliz.* the Case of the Lord *Bray*, who covenanted, That if his son marry with the consent of four, whom he especially named: *viz. A. B. C.* and *D.* that then he would stand seised to the use of his son, and his wife, and to the heirs of their two bodies begotten; One of the four was attainted and executed; The other did consent that he should marry such a one; he married her, yet no estate passed, because the fourth did not consent, and it was a joynt trust. 38. *H. 8. Br. Devises* 31. A man willeth that his Lands deviseable shall be sold by his Executors, and makes four Executors: all of them ought to sell; for the trust which is put upon them, is a joynt Trust. But *Brook* conceiveth, that if one of them dieth, that the others may sell the Lands. The Case betwixt *Vincent* and *Lee*, was this; A man devised, That if such a one dieth without issue of his body, that then his Sons in law should sell such Lands: and there were five sons in law when the Testatour died; and when the other man died without issue, there were but three sons in law, and they sold the Lands, and it was holden that the Sale was good; because the Land was not presently to be sold. Also he said, that in the principall Case here, they have an Interest in the Lands, and each of them hath a part; therefore the one cannot sell without the other. But if the devise were, that four should sell; they have not an Interest, but onely an Authority. As to the Statute
of

78 Bonefant against Sir Richard Greinfeld.

of 21. H.8. Cap.4. he said, that that left our Case to the Common Law : For that Statute, as it appeareth by the preamble, speaks onely of such Devises by which the Land is devised to be sold by the Executors, and not devised to the Executors to sell. And goes further, and saith, Any such Testament, &c. of any such person, &c. therefore it is meant of such a devise made unto the Executors; and then no Interest passeth, but onely an Authority, or a bare Trust : But in our Case, they have an Interest, for he who refused, had a fourth part ; Then when the other sell the whole, the same is a disseisin to him of his part. If a Feoffment be made to four, upon condition that they make a Feoffment over ; and two of them make the Feoffment, it is not good. Also the words of the Will prove, that they have an Interest; for it is, that his Devisees shall sell, &c. *Laisson* contrary, And he said, That although the Devise be to them by their proper names, and not by the name Executors ; yet the intent appeareth that they were to sell as Executors, because it was to the performance of his last Will ; and that may be performed as well by the three, although that the other doth refuse ; and the Sale of the Land doth referre to the performance of his Will, in which there are divers Debts and Legacies appointed to be paid. 2.H.4. and 3.H.6. A man devised his Lands to be sold for the payment of his debts, and doth not name who shall sell the same, the Lands shall be sold by his Executors. 39. Aff. A Devise is of Lands unto Executors, to sell for the performance of his Will, the profits of the Lands before the Sale shall be assets in the Executors hands. 15. H. 7. 12. is, That if a man devise, that his Lands shall be sold, they shall be sold by his Executors. Also if I devise that my Executors shall sell my Lands, and they sell, it is an Administration, and afterwards they cannot plead, that they never were Executors, nor never administered as Executors ; And although there are divers Authorities to be executed, yet it is but one Trust. 39. Aff. 17. is our very Case. A man seised of Lands deviseable, devised them to his Executors to sell, and died, having two Executors, and one of them died, and the other entred and sold the Land ; and the Sale was good. 49.E.3. 15. *Isabell Goodcheapes* Case ; Where a man devised, that after an Estate in taile determined, that his Executors should sell the Lands, and made three Executors, and one died, and another refused, the third after the taile determined, sold the Land ; and the Sale was holden good, and that it should not escheate to the Lord, for the Land was bound with a Devise, as with a Condition ; as to the Statute of 21.H.8. Cap.4. the preamble of the Statute is, as it hath been recited : and although for example, the Lands in use are only put, yet the Statute is not tied only to that ; As in the Statute of Collusion of *Malbridge* ; Examples are put only of Feoffments and Leases for years, yet there is no doubt but that a Lease for life, or a gift in taile to defraud the Lord, is within the Statute.

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† So the Statute of *Donis Conditionalibus* puts onely three manner of estate tailles. But *Littleton* saith, That there are many other estate tailles, which are not recited in the Statute: So here, our Case is within the Mischiefe of the Statute of 21. H. 8. Cap. 4. although it be not within the Example. So the Statute of *West.* 1. is, That if the Gardien or Lessee for years, maketh a Feoffment in Fee, *Tam Feofator quam feofatus habeantur pro disseisforibus*: yet 22. Aff. is, That if Tenant by *Elegit* make a Feoffment, it is within the Statute. Also it may be a doubt, Whether Land devisable onely by custome bee intended in the Statute of 21. H. 8. Cap. 4. And whether Land devisable by the Statute of 32. H. 8. be within it or not, viz. If a Statute of a puiſne time shall be taken by Equity within a more Ancient Statute: and I conceive it may; as 12. H. 7. the Statute of 4. H. 7. which sayes that the heire of *Cestuy que use* shall be in Ward, shall extend to the Statute of *Prerogativa Regis*; for if he be in Ward to the King, he shall have Prerogative in the Lands, to have other Lands by reason thereof. *Gandy* Justice did rely very much upon the word [*Devisibles*,] viz. that they have an Interest, and that the Sale was not good. *Suit* Justice, They are both Executors and Devises of the Lands; Devises of the Lands, and Executors to performe the Will. *Cook*, he who refused to sell, cannot waive the Freehold, which is in him by a refusall in *pars*, as 7. H. 2. and 7. E. 4. but ought to waive it in a Court of Record; therefore he hath an Interest remaining in him. *Clenche* Justice; What if he had devised the Lands to four, and made one of them his Executors, and willed that he should sell; could not he sell? All the Court agreed that he might. *Cook*, When a man deviseth that his Executors shall sell, the Fee descends to the heir; yet they may sell that which is in another: but the same is not like to our Case. It was adjourned.

Mich. 28, 29. Eliz. in the King's Bench.

93.

A Judgement was given upon a Bond for four thousand pound; And the *Scire facias* was sued for three thousand pound, and he did not acknowledge satisfaction of the other thousand pound. *Hangh-ton* moved, That the *Scire facias* should abate. As if a man brings Debt upon a Bond of twenty pound, and shews a Bond for forty pound, and doth not acknowledge satisfaction for 20^l, it is not good: The Justices would advise of it. And at another day it was moved againe, Whether the *Scire facias* was good; because it doth recite *Quod cum nuper* such a one, *recuperasset* four thousand pound, and doth not shew
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in what Action, or at what day the Judgment was given, or the Recovery had. *Piggot*, That is not material, for such is the Form in an *Andis a quere-la*, or Redisseisin. As to the other, That he doth not acknowledge satisfaction, as in the Case before cited by *Haughton*, which Case is in 1. H. 5. That is not like to an Execution, for an Execution is joint, or severall, at the will of him who sues it forth; as in 19. R. 2. *Execution* 163. hee may have part of his Execution against one in his life time, and if he lieth, other part against his Heir or Executor. Note, the Execution was of the whole, but because the Defendant had not so much, he had but part against him who had no more; and therefore of the residue he had Execution against the Heir. *Gawdy* Justice, I conceive that he cannot have an Execution, unlesse he acknowledge Satisfaction. There is no difference, as to that betwixt the Action of Debt upon a Bond and a *Scire facias*; and the intendment, viz. that it shall be intended that he was paid, because he sued but for Three thousand Pound, will not help him. *Piggot*, as to that, vouched a Case out of 4 & 5. *Mary*, in *Dyer*, which I cannot find. *Suic* Justice said, That if the Defendant in the *Scire facias* say nothing by such a day, that Judgement should be entred for the Plaintiff. *Quod executio fiet.*

Mich. 28, 29. Eliz. in the Kings Bench.

94

Judgement was given against an Infant by default in a reall Action of Land: And a Writ of Error was thereupon brought; and it was argued, That it is not error; for in many cases an Infant shall be bound by a Judicious act, as 3. E. 3. *Infant* 14. Where an Infant and a Feme Covert bring a *Formedon*; and the woman was summoned and severed: And it was pleaded, That where the Writ doth suppose the woman was Sole, she was Covert; and Judgment was demanded of the Writ, and that the Infant could not gainsay it, but confessed it; this Confession of the Plea which abated his Writ, was taken. And 3. H. 6. 10. *Br. Saver Defaults* 51. An Infant shall not save his default, for he shall not wage his Law; See there, that the Default shall not be taken against him; therefore that book seems rather against it, then for it. *Vide* 6. H. 8. *Br. Saver Defaults* 50. That Error lieth upon a Recovery by default against an Infant: other wise, if it be upon an Action tried; so is 2. *Mar. Br. Judgment* 147. It was said, That a generall Act of Parliament shall bind an Infant, if he be not excepted. The Justices did seem to incline, That if Judgement be given by default, that it shall bind an Infant; but there was no rule given in the Case.

Mich.

Mich. 28, 29. Eliz. in the Kings Bench.

95

A Clark of the King's Bench, sued an Officer of the Common Pleas, and he of the Common Pleas claimed his Priviledge, and could not have it granted to him; for it is a generall rule, That where each of the persons is a person able to have Priviledge; he who first claimes it, viz. the Plaintiffe, shall have it, and not the Defendant; As if an Attorney of the Common Pleas sueth one of the Clarks of the Kings Bench; yet he of the Kings Bench shall not have Priviledge, although the Kings Bench be a more high Court, because the other is Plaintiffe, and first claimeth it.

Mich. 28, 29. Eliz. in the Kings Bench.

96

A M Action upon the Case upon a Promise was brought; but the Case was so long that I could not take it: But in that Case, *Tanfield*, who argued for the Defendant, said, That it is not lawfull for any man to meddle in the cause of another, if he have not an Interest in the thing, for otherwise it will be Maintenance. But if a Custome be in question betwixt the Lord of the Manor and Copy-holder; all the other Copy-holders of the Manor may expend their money in maintenance of the other and the Custome; and the Master may expend the money of the servant in maintenance of the servant: So he in the Remainder may maintain him who hath the particular Estate. Maintenance is an odious thing in the Law, for it doth encrease troubles and Suites. He argued also, How that Bonds, Obligations, and Specialties, might be assigned over, how not. 34. H. 6. 30. *Br. Maintenance* 8. If *J. S.* be indebted to me, and I be indebted to *J. D.* I may assign that Debt to *J. D.* with the assent of *J. S.* otherwise not, as I conceive. And there also another difference is taken, That Damages which are to be recovered for Trespas, Battery, &c. cannot be assigned over, because they are as yet uncertain; and perhaps the Assignee may be a man of great power, who might procure a Jury to give him the greater Damages. If a Bond be for performance of Covenants contained in an Indenture of Lease, if he assign the Lease, he may assign the Bond also, because they are concomitants; and he hath an Interest in the Lease, and therefore he may sue the Bond: But if the

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Covenants be first broken, and afterwards he assign over the Lease, if the Assignee sue the Bond, it is directly Maintenance: but if he assign over the Lease, and afterwards the Covenants are broken, if he sue there it is no Maintenance: But if he assign over the Bond, and reserve the Lease in his own hands, and then the Covenants are broken, and the other sue the Bond for the performance of Covenants, it is Maintenance: And to all that *Cook* agreed. The second Point; An *Elegit* is awarded to the Sheriffe, and he extends the Lands, and doth not returne it; Whether it be a lawfull Execution to the party or not? is the question. It is a good Execution, unlesse the words of the Writ be conditionall, for then there must be a returne of the Writ; as a *Fieri facias* must be returned, otherwise the Execution is not well done, for it is conditionall, viz. *Ita quod habeas pecuniam in curia, &c.* So is it of a *Capias ad satisfaciendum*, *Ita quod habeas corpus hic*. But an *Elegit* is not conditionall. Yet *Kemp* the Secondary said, That in the end of the *Elegit* is, *Et de eo quod inde feceris nobis in dicta cancellaria tali die ubicunque tunc fuerit sub Sigillo distinctè & apertè constare facias, &c.* And so is the forme of the Writ in *Fitz. Nat. Br.* 266. *Tanfield*. That is true, but it doth not make the Writ conditionall: but that is the Entry of the Court and the Sheriffe, and not the Entry of the Party and the Sheriff. 11. *H.* 4. 59. by *Hankford*, who was a man of great knowledge, and lived in learned times. If the Recognisee of a Statute Merchant sueth Execution of it, although the Writ be not returned, and the Recognisee hath Execution, and afterwards the Recognisor purchaseth other Lands; and afterwards the Recognisee comes and saies, That the Writ is not returned, and sues forth another Writ, the Recognisor shall have an *Audita querela* in that Case, and shall surmise in Fact, how that execution was done by the first Writ, and yet there is no Record that execution was done by the first Writ. So 19. *E.* 3. *Briefe* 370. A Writ issued to have Execution in forty Towns, and an Extent was made, and delivered of Lands in forty Towns; and the Return made mention but of Execution in eight Towns, and therefore the Party would have had a new Writ; and the other Party was received to averre against the Record of the Returne, that the Extent was in forty Towns. 12. *E.* 3. *Scire facias* 117. Upon an *Elegit* the Sheriffe returned *extendi feci*, and did not say, *deliberavi*; and in truth, he did deliver the Lands in extent, and therefore he could not have a new Execution. 20. *Eliz.* betwixt *Colfill* and *Hastings*. *Colfill* had an extent upon the Lands of *Hastings*, and the Sheriffe being a friend to *Hastings*, did not deliver full Possession to *Colfill*, but gave him Possession in one part in the name of all the others. *Hastings* continued Possession of all the rest, and being upon Election of new Sheriffs, *Colfill* was not over hasty to put him out, for he was in hope to have a more favourable Sheriffe; and the first Writ was not returned,

and there being a new Sheriff, he sued forth a new Writ to have Execution. The Defendant said, That he had before sued forth the like Writ, and had Execution. And *Colfill* said, That the first Writ was not returned; and yet the Opinion of the whole Court was, That it was a good Execution, and so it was ruled; but the Case was overthrown afterwards upon another Point. So the Earle of *Leicester* had a Statute extended upon the Land of Mr. *Tanfields* Mother; and it was not returned; and yet when he would have sued forth another Execution, he could not have it allowed him by the rule of the Court, because the first Execution was a good Execution, although it were not returned. 15 *Eliz.* It was the Case of the Countesse of *Derby*, who married the Earle of *Kent*: in an *Habere facias seisinam* in a Writ of Dower, Execution was served, but not returned, and therefore she prayed a new Writ, but could not obtain it, because the first was well executed, although it was not returned. So also was the Lord *Morleyes* Case in the Kings Bench, in 28. *Eliz.* the Writ was not returned, and yet the Execution was well done: And therefore he concluded, That the Execution was good, although the Writ was not returned. *Cook* contrary, An *Elegit* ought to be returned, and it is void if it be not returned. As to the Case before cited of 19. *E. 3.* which began 9. *E. 3.* 450. And all the other Cases put out of the old Books. They are upon extents of Statutes; and there is a great difference betwixt an *Elegit* and Extents upon Statutes; as 15. *H. 7.* 14. It was agreed, That where a man recovers Debt or Damages, or hath a Recognisance forfeit unto him, his Executors shall not have Execution, without a *Scire facias* first sued; contrary upon a Statute Staple or Merchant; and the like if the Defendant dieth, the Plaintiff shall not have an Execution by *Fieri facias* against his Executors, but he must first have a *Scire facias*: So if the Court change, as if the Record cometh into the Kings Bench by Error, and Judgement be affirmed; the Plaintiff who recovered, shall not have a *Fieri facias* against the Defendant, but must first have a *Scire facias*: But otherwise it is of a Statute, like the Case of 14. *H. 7.* 15. *Br. Execution* 59. The Case of 12. *E. 3.* doth not speak of *Elegit*, but of Statutes and Extents. Also the *Elegit* and the Extent differ in the Entry; for the *Elegit* hath a speciall and precise Entry, as *Elegit sibi executionem, &c.* And a man shall not have a *Capias* after an *Elegit*; as 15. *H. 7.* is: And being a speciall Entry of Record, it ought to be returned; for otherwise it doth not appear that Execution is done; and so there shall be great mischief, because infinite Executions may issue forth. There is not any Book in the Law directly in the Point: But I will put you as strong a Case: A Judgement is given upon an Exigent by the Coronor; yet by 28. *Ass.* 49. If there be no Return of the Exigent, it is no sufficient Out-lawry; and one Pleaded the same in the plain-

Plaintiffe, and said, that it appeared by the Record, and vouched the Record: and because the *Exigent* was not returned, it was not allowed. And so was the Case of *Procter* and *Lambert*, 4 & 5. *Philip* and *Marie* adjudged. As to the Reports which are not printed, vouched by *Tanfield*, *eàdem facilitate negantur quàm affirmantur*. Upon an *Elegit*, if there be goods sufficient, the Sheriff is not to meddle with the Lands; and if there be not sufficient goods, yet hee is not to meddle with the beasts of the plough. If a man have an *Authoritie*, and he doth lesse then his *Authoritie*, all is void; as here the Return of the Writ is part of his *Authority*. As 12. *Ass.* 24. If a man have a letter of *Attorney* to make *Livery* and *Seisin* to two, and he makes it to one, all is void, and he is a disseisor to the Feoffor. So 4. *H.* 7. If he have a letter of *Attorney* to make *Livery* of three Acres, and he makes onely *Livery* of two Acres, and not of the third Acre, it is void for the whole. Also the *Elegit* is, *Quod extendi facias & liberari, quousq;* the Debt be satisfied: and therefore if the land be extended onely, and there be no delivery made of the land, *ut tenementum suum liberum*; according to the Writ, then there is no execution duly done. And in the principall Case, there was no delivery made of the land. It was adjourned.

Mich. 28, 29. Eliz. in the King's Bench.

STransam brought a Writ of Error against Colburne, upon a Judgment given in a Writ of *Partizione facienda*; and divers Errors were assigned. The first Error assigned was, That the party doth not shew in his Writ, nor in his Declaration, upon what statute of Partition hee grounds his Action. And there are two Statutes; viz. the Statute of 31. *H.* 8. chap. 1. and the Statute of 32. *H.* 8. chap. 32. And yet hee groundeth his Action upon one of the Statutes. As 3. *H.* 7. 5. Where the servants of the Bishop of *Lincoln* were indicted of Murder, *eo quod ipsi in Festo Sancti Petri* (2. *H.* 7.) *felonice apud D. murdraverunt &c.* and because there are two Feasts of Saint Peter, viz. *Cathedra*, & *Advincula*, therefore the Indictment was not good. 21. *E.* 3. One brought a *Cessavit* by severall *Precipes*, viz. of one Acre in *D.* and of another in *S.* and of the third in *Villa prædicta*: and because it was uncertain to which, *prædict.* shall be referred, it was not good. 5. *H.* 7. *Br.* Action upon the Statute 47. An Information was in the Exchequer for giving of Liveries, and the partie did not declare upon what Statute of Liveries; and Exception

Exception was taken to it, and the Exception was not allowed, because that the best shall be taken for the King; but if it had been in the Case of a common person, it had not been good. So, if a man bring an Action against another, for entry into his Land against the forme of the Statute, it is not good, because hee doth not shew upon what Statute hee grounds his Action: Whether 8. H. 6. which gives treble damages; or 2. H. 2. which gives Imprisonment, and single damages. The second Error which was assigned by *Weston*, was, That the Declaration doth shew *Quod tenet pro indiviso*; and doth not shew what estate they held *pro indiviso*. And there is a Statute which gives Partition of an estate of an Inheritance. viz. 31. H. 8. Cap. 1. And another which gives partition for years, or for life; and he doth not shew in which of the Statutes it is. As if one claime by a Feoffment of *Cestuy que use*, as 4. H. 7. is, he ought to shew, that the *Cestuy que use* was of full age at the time of the Feoffment, &c. for it is not a good Feoffment, if he be not of full age. So here he ought to shew, that he is seized of such an estate, of which by the Statute he may have a Writ of Partition. For in many Cases there shall be Joynt-Tenants, and yet the one shall not have a Writ of Partition against the other by any Statute. As if a Statute Merchant be acknowledged to two; and they sue for the execution upon it, I conceive, that the one shall not have partition against the other. So if two Joynt-Tenants bee of a Seignorie, and the Tenant dieth without heir, so as the Lands escheat to them, they are Joynt-Tenants, and yet Partition doth not lye betwixt them by any Statute: Therefore one may be seised *pro indiviso*, and yet the same shall not entitle him to a Writ of Partition. *Shuttleworth* contrary. The Statute doth not give any forme of Writ, but the Writ which was at the Common Law before; And therefore it is not to be recited, what kind of Writ he is to have. As to the second point, It is not necessary to shew the estate, because it cannot be intended, that he hath knowledge of the estate of the Defendant. For if one plead Joynt-tenancy on the part of the Plaintiffe, hee shall not shew of whose gift: but if the Defendant or Tenant plead Joynt-tenancy of his part, he ought to shew of whose gift, and how. 7. E. 6. *Plo. Com. Partridges* case. In a Case upon the Statute of Maintenance, The Plaintiffe may say, That he accepted a Lease, and shall not be forced to shew the beginning or the end of it, or for what years it is. In the Case of the Indictment before: and the Case of severall *Prepices* of severall Acres in severall Towns, that lyeth in the Plaintiffs Cognizance. But here, how can the Plaintiffe know the Defendants estate, because he may change it as often as he pleaseth; and therefore it is uncertain; for if before he had a Fee, hee might passe away the same unto another, and take back an estate for years. Also the Plaintiffe hath appeared, and pleaded to the Declaration;

And

And therefore he shall not have a Writ of Error *Gaudy* Justice, That is not so. *Shuttleworth*; True, if there be matter of Error apparant. *Gaudy* Justice, Cannot you take notice of your own estate? *Cook*. The Declaration is not good; therefore the Writ of Error is maintainable. By the Common Law, No partition lieth betwixt Tenants in common, as these are. And the Statute of 31. H. 8. gives Partition onely of an estate of Inheritance, and prescribes also that the Writ shall be devised in the Chancery: there he conceived the Ancient Writ is not to be used. I grant for a generall rule, That if a Statute in a new Case give an old Writ; he shall not say *Contra formam Statuti*, because it is not needfull to recite the Statute, or make mention of it. And the Statute of 32. H. 8. Cap. 32. sayes, That the Writ shall bee devised upon his, or their Case, or Cases; If one bring a Writ upon the Statute of 31. H. 8. It is not necessary to shew of what estate he is seised, but *de hereditate* generally. But upon 32. H. 8. he ought to shew of what estate, viz. for years, or for life. As it was in the Case where Sir *Anthony Cook*, and *Temple*, and *Wood* were parties; which Case is in *Bendloes Reports*, Mich. 8. Eliz. which was a great Case twice stood upon, and argued. And the reason there is given, That every Case is not within the Statute; and if at the common Law, and not within the Statute, the Writ shall not be grounded upon the Statute. For in the Case before, they might have Partition at the common Law, as one Co-partener against the Alience of the other Co-partener may have. Also he said, That severall Judgements are to be given as the Case is, upon the severall Statutes: for the Judgement upon the first Statute of 31. H. 8. of Inheritances is, *Sic firma partitio in perpetuum*; but upon the Statute of 32. H. 8. it is not so; for Judgement given upon that Statute shall not bind him in the Reversion; for there is a *Proviso* in the Statute in the end of it, That Partition made by force of that Statute shall not be prejudiciall or hurtfull to any persons, other then such who be parties to the said Partition, their Executors, or Assignes. But here it is observed, That by intendment he cannot have knowledge of his estate. *Answ.* That is at his perill: For if he cannot have knowledge of his estate, there cannot be any Partition upon any of the Statutes. If he will have benefit of the Statute, he ought to shew that he is within the Statute; and if he cannot shew it, then it must remaine at the common Law. But it hath been objected, that we have confessed the Declaration to bee good, because we have appeared and pleaded. I answer, That if the Declaration want substance, it shall never bee made good by Plea, or Confession. But if it want circumstance, that perhaps may bee made good by pleading, or confession. *Tanfield* contrary. Two principall things are alleadged for Errour; That the Declaration is uncertaine in the Estate, and that it is upcertaine

in the Statute. I may know my own Eſtate, but not the Eſtate of my Companion; for it is uncertain, and he may ſecretly change it when he pleaſeth. But then *Cook* ſaid, It muſt remaine as at the common Law. *Itane?* Then farewell Statute; for it may eaſily be defrauded, and no uſe of it; for if I cannot know the Eſtate, I cannot have an Action upon the Statute; but our Caſe is better, for our Caſe is, that *recuſat ſacere partitionem contra formam Statuti in hoc caſu proviſam*: and that is according to the Statute; for be the Eſtate an Eſtate of Inheritance, Free-hold, or Leaſe for Years, we leave it indifferent to be referred to the conſideration of the Law; and according as our Caſe ſhall fall out. Alſo it is but an Incertainty, and you have pleaded to it, and therefore it is no Error; but I grant that if it were matter of ſubſtance, that it were Error. Yet *Fitz. Nat. Br.* 21. d. In a Writ of Entrie *ſur diſſeiſin*, if the Originall Writ want theſe words, viz. *Quam clamat eſſe juſ & hereditatem ſuam*: If the Tenant do admit of the Writ, and plead to the Action, and loſeth, he ſhall not aſſigne the ſame for Error, becauſe he hath admitted the Writ to be good by his Plea. So in Detinue of Charters concerning Lands, if the Plaintiffe in his Count or Declaration doth not declare the certainty of the Land, &c. if the Defendant doth admit of the Count or Declaration, and plead, the Declaration is made good. As to the Judgement, If the word *In perpetuum* be in it, either in the one Caſe or in the other, it ſhall be conſtrued, to be but during the Eſtate. In a Writ of Partition there are two Judgements; the firſt, That *Fiet Partitio*; Secondly, When the Partition is made and returned; the Judgement is, That *ſit firma & ſtabilis Partitio*. *Gawdy* Juſtice, The Writ is to be deviſed upon his or their Caſe or Caſes, therefore the Party ought to ſhew his Caſe in ſpeciall, and what Eſtate he hath. And it is no answer, that he cannot know the Eſtate of the Defendant: for in a *Precipe* at the common Law, he ought to take notice of the Eſtate of the Tenant, or otherwiſe his Writ ſhall abate for the miſpriſion of it; for if he bring it againſt a Termor it is not good. And if the Statute of 31. H. 8. had only been made, and not the Statute of 32. H. 8. If he had brought a Writ of Partition upon the Statute, he ought to have ſhewed that he had an Eſtate of Inheritance againſt whom he brought the Writ. *Suit* Juſtice agreed with *Tanfield* in the whole. *Gawdy* was ſtrongly of the other ſide, That he ought to ſhew within the purview of which Statute he was; and if he will enable himſelf by Law to bring the Writ, he muſt enable himſelf to be within the Law. And he ſaid, That *Temples* Caſe was adjudged, as it was accordingly vouched by *Cook* before.

Mich. 28, 29. Eliz. in the King's Bench.

98 DENNIE and TURNER's Case.

AN Action was brought upon the Statute of 5. *Eliz.* for Perjury; and the Plaintiffe did declare, That where an Action of Debt was brought *Hill. ultimo preterito, 27. Elizabeth* whereas in truth the Action in which he was perjured was, *Hill. 28. Eliz.* And so the recitall did misse the Record. *Bartlet* argued upon the Case put in *Leicester* and *Heydens* Case, in *Plowdens* Commentaries, where time, place, and number, ought to be observed, otherwise all is void; also he said, That if the party should recover here, upon a Perjury, committed upon a Record of 27. *Eliz.* and should also recover in another Action upon the Statute of 5. *Eliz.* for a Perjury in an Action begun 28. *Eliz.* that he should be double charged. *Cook*, He cannot bee double charged, for it is betwixt the same Parties, and in the same Cause, and only a Circumstance is mistaken. *Clench* Justice, It is needfull to shew in what Action the first Perjury was committed; for if hee say in *Trespasse*, whereas in truth it was in *Debt*, all is naught. *Gandy* Justice, If no Action be alledged, he cannot sue upon the Statute of 5. *Eliz.* But the Case was upon a speciall Verdict, and the Verdict did find that the Action was brought at another time then any of the Parties had alledged: And that Variance was first found by Verdict, and no mention made of it before; and therefore *Cook* said it was void; for he said, That by the book of 22. *Ass. 17.* The Jury cannot find any other thing then the Parties have alledged: For there the Jury found a dying seised after Judgement in a Recovery; whereas a dying seised was alledged, and did not say after a Recovery.

Mich. 28, 29. Eliz. in the Kings Bench.

99 EGLINTON and AUNSELL's Case.

IN an Action upon the Case for Words; the words were these, Thou art a Cosening Knave, Crowner, and hast cosened many of thy Kindred of their Lands. *Cook*, It is adjudged, That Cosener will bear no Action; for the words are too generall. And the word [Cosener] doth not go to the Office in the Principall Case: also the word [Cosening] is a word abused; 30. *H. 8. Br. Action upon the Case* 104.

Falſe

Falſe perjured man bears an Action; but falſe man without [Perjured] will bear no Action, and is nothing elſe but falſe and fraudulent. There was a Caſe, as *Cook* ſaid, betwixt *Osborne* and *Fritzell*; You did robb me, and took away my Evidences and a *Sub pena*. And it was ruled, That no Action did lie for them: And there it was holden, That the word [And] was a Copulative. *Kirby's* Caſe, Thou art a crafty coſening Knave, and haſt coſened many of thy Kindred: Adjudged not Actionable. *Snagg* Serjeant contrary, That the Action lieth; for he ſaid, That a Crowner is ſworn to do his Office; and if he be falſe and deceitfull in his Office, then he is forſworn; and the word [And] here begins a new ſentence, and doth not expound the precedent words, as the words [becauſe] or [in that] &c. *Clench* Juſtice If the word Coſener had been left out, it had been a cleer Caſe that the words would not have born an Action: And if one do call him coſening Crowner, it is cleer, the words are Actionable. *Gaudy* Juſtice, We are to go ſtrongly againſt theſe kind of Actions: If the words [Coſening] ſhall go and extend to the word Crowner, then cleerly an Action doth lie, in reſpect of the Office: And then if [And] and all the ſubſequent words had been left out, yet the Action would lie. *Smit* Juſtice, If there were words ſufficient before the word [And] to maintain an Action, the ſubſequent words ſhall not overthrow thoſe that went before: But if the words had been, Thou art a Coſening Knave, Crowner, in coſening of thy Kindred; the Action had not been maintainable: but the word [And] is not a word explanatory as the word [In] is. The better Opinion of the Court was, That the words were not Actionable.

Mich. 28, 29 Eliz. in the Kings Bench.

100

A Man brought an Action upon the Caſe for ſpeaking theſe words of him, viz. He hath aided Pirats, contrary to the Lawes of the Realme, and againſt a Proclamation in that behalfe. *Snag* ſaid That the words are not Actionable, becauſe there wants the word [Scienter] for an honeſt man may unwittingly do ſo: And if a man chargeth one in an Action upon the Statute of 5. *Elizabeth*, and declare that he ſaid, That he was perjured, contrary to the forme of the Statute; hee alſo ought to ſay, That hee did it willingly and corruptly. *Cook*, True, if a man bring an Action upon the Statute of 5. *Elizabeth*. But if he ſaith, Such a one is a perjured man generally, an Action upon the Caſe will lie, without ſaying willingly and corruptly. Alſo thoſe words, viz. [Contrary to the Lawes

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of

of the Realm) do imply *Scienter*; for if it were not *Scienter*, it could not be contrary to the Lawes of the Realme. *Clenche* Justice, I conceive that the word [*Scienter*] is a materiall word in this Case; and vouched the Lord *Shandoes* Case, where one said, That he was a maintainer of Theeves, and it was adjudged that the Action would lie. It was one *Sidenhams* Case, Where one said, That a Robbery was done, and that such a one smelt of it; and an Action was brought for the words, and adjudged, That an Action would lie. And the words here are as forcible, as if he had said *Scienter*; and the Case was adjourned for the search of prefidents untill the next Terme.

Mich. 28, 29. Eliz. in the Kings Bench.

101

IF two men be partners of Merchandizes in one Ship; and one of them appoints and makes a Factor of all the Merchandizes; It was moved by *Godfrey*, and not denied by the Justices, That both of them may have severall Writs of Account against him, or they may joine in one Writ of Account, if they please. *Quare* of that.

Mich. 28, 29. Eliz. in the Kings Bench.

102

A Man made a Contract with another man, when he dwelt in the City of *London*; and afterwards he who made the Contract went from the City and dwelt within the *cinque* Ports; and he being afterward impleaded in the Kings Bench upon the Contract, claimed the priviledge of the *cinque* Ports; which according to 12. E. 4. is, That those of the *cinque* Ports shall not be sued elswhere then within the *cinque* Ports. *Suit* Justice said, That that was true, for any matter or cause arising within the *cinque* Ports: But otherwise, if a man do enter upon a Bond of One hundred, or One thousand Pound, and then go and dwell in the *cinque* Ports; perhaps so the Obligee might lose his Debt. And it was adjudged That the Defendant should not have Priviledge.

Mich. 28, 29. Eliz. in the Kings Bench.

103. SIR JERVIS CLIFTON'S CASE.

IN a *Quo Warranto*. The Information was, That where the Defendant was seised of a Mannor, and of a House within it, That he claimed to have a Court or View of *Frankpledge infra messuagium prædictum*; and further it was, that *Sine aliqua Concessione sive auctoritate usurpavit Libertates prædictas*. The Defendant pleaded, That *Non usurpavit Libertates prædictas infra Messuagium prædictum, modo & forma*. Piggot, The Plea is not good; for the naturall Answer to a *Quo Warranto* is, either to claime or disclaime, and he doth do neither of them; And if a man will tender a generall issue, he ought so to tender it as the Nature of the Action doth require. That he was never seised after time of memory is no plea in Rescous. In Debt *rein arere*, is no plea, but he ought to answer to the *Debet*. The speciall matter alledged in the Action, ought to be answered, and the generall not to be pleaded; as it is pleaded here, *Non usurpavit, &c.* as in 21. E. 3. Detinue of Charters was pleaded in a Writ of *Dower*; and she said, That such a one was seised, and did enfeoffe her, and her Husband; and so the Deeds did belong unto her. The Partie shall not traverse, that they did not belong unto her; but must answer unto the especiall matter: *viz.* the Feoffment. Also he said, *Quod non usurpavit, &c. infra Messuagium prædictum*; where he ought to have said, *Infra Manerium prædictum*. An Account was brought upon a Receipt for seven years, and the Defendant pleaded to two of the years; and issue was joyned upon it: And it was adjudged error. Godfrey. He ought to say, *Non usurpavit Libertates prædictas, nec earum aliquam*: for he ought to answer *singulatim*, as 4. H. 7. Where one was bounden that hee, and his servants should keep the Peace; he shall not say generally, that he and his servants have kept the Peace; but he ought to answer for every one particularly; So here he ought not to answer generally, *Non usurpavit Libertates prædictas, &c.* without saying, *Nec earum aliquam*. Also it is naught, because he saith, *Non usurpavit infra Messuagium prædictum, &c.* For although it be sufficient for us to say, *Quod usurpavit infra Messuagium prædictum*; because if hee hath usurped upon any part of the Mannor, *Usurpavit infra Manerium*; yet it is not good for him to answer so: for if he hath usurped in any part of the Mannor, although not in the Messuage, it is sufficient for us: as 33. H. 8. *Br. Traversians* cco. 367. Information was in the Exchequer, *eo quod* the Defendant had bought certaine Wools

of *W. N. contra formam Statuti*, where he is not a Draper, nor was a Draper. It is no issue, that he did not buy them of *W. N.* but hee ought for to answer, that he did not buy them *modo & forma*. For whether he bought them of *W. N.* or of *I. S.* it is not materiall, for that is not traverfable; but the buying contrary to the forme of the Statute is the matter traverfable: Besides, he doth not answer, that he hath these Liberties *Conceffione*, or *Authoritate Regia*. And it followes, neceffarily, That if he hath them not by Royall Authority, that then he hath usurped them: as 3. *H. 6.* and 33. *H. 6.* One alledged a Devife, that the Lands were devisable in such a Town, &c. And the other pleads, That the Lands are not devisable; it is no plea, because he doth not answer to the Custome of the Town. So here hee pleads, *Non usurpavit*, but he doth not answer, Whether he hath them *Authoritate Regia*, or not. Cook, The Queen demands *Quo Warranto*? He sayes, *Non usurpavit*, Doth not that answer the question? Doubtlesse it is a direct Answer: as 3. *E. 3. ultin. North*, If he doth not use any Liberty, a *Quo Warranto* doth not lie. And as to that Objection, That he ought to answer directly to your question, it is not so; for 31. *E. 3.* Voucher. I may vouch in a *Quo Warranto*, yet there I do not directly answer to your question. So in *Tempore E. 1. ibidem*, in a *Juris utrum*, is a Question, Who hath right: yet he is not bound directly to answer the question. 17. *E. 3.* he may plead the generall issue. And it is a generall rule: Where a thing is materiall, without which you cannot have an Action; that there I may traverse it: as 8. *H. 6.* and 21. *H. 6.* upon the Statute of Maintenance. *Ne mainteina pas*, is a good plea, and yet it doth not answer to the speciall matter alledged. And upon *Non usurpavit*, all the speciall matter may be given in evidence. 14. *H. 4.* Where one is charged as Bayly of a Manor, *Curam habens & administrationem bonorum*; there it is a good plea to say, That he was not his Receiver *modo & forma*; and that shall go to the goods as well as to the Mannor: and so is 49. *E. 3.* But it was objected, That the issue is *multiplex* and uncertain, for he might usurp by *Misuser*, or *non user*; because it had been used, and now it is not used; To that I answer; That upon *Non intrusit*, or Not guilty; he may give in evidences 100. titles; and the Court might be enveigled therewith as well as in this Issue. But then it was objected, That he ought to say, *Non usurpavit Libertates predictas, nec earum aliquam*. I answer, That he ought not so to do; for if a *Quo Warranto* be brought of 100. Manors, or Liberties: *Non usurpavit modo & forma* goes to them all. And he shall not say, *Non usurpavit in hoc, nec in illo, nec in illo*; The book before vouched by Godfrey, 33. *H. 8.* of buying of Wools of *I. S.* is not Law; But then it was further objected, That he doth not answer whether he hath them *Authoritate Regia*, or not? To that I answer, That is answered in these words, *Modo & forma*. But now let us see if the Information be good,

good, or not. For it was shewed, that the Defendant was seised of a Manor, within which there is an house, within which house he claims to have a Court with view of Frankpledge, and to summon the Tenants *ad eandem Curiam*; and this is uncertain, where he saith, *ad eandem Curiam*: for there are two alledged before, and therefore it is uncertain to which it shall be referred. Also he saith, that he claimeth to have a Court, and it may be it is a Court of Pipowders, or Torne; as 10. E. 4. 15. Where it is said, That an Indictment was taken at the Court or view of Frankpledge, and there holden it was not good; for it cannot be intended what Court. And as to that, that he sayes, that he clayms to have a Court &c. *infra Messuagium prædictum*, &c. and to call twelve men to it, and that these twelve men ought to be of the Jury: there is an ancient Reading which goes under the name of *Fronicks* Reading upon the Statute of *Quo Warranto*: And there it is holden, That a *Quo Warranto* doth not lie of the claim of a thing which cannot be claimed; as to claim Felons goods, or to pardon Felons: for those are things which lie onely in point of Charter. If the claim be within the Messuage, then he cannot call men out of the Messuage: as if he claime within the Manor, hee cannot call men out of the Manor. But a man may have a Leet belonging to a house, or within a house. *Suit Justice*, It is *Habere & tenere infra Messuagium prædictum*: and that he may well do. A *Quo Warranto* contains but two things in it: First, it is demanded *quo Warranto* hee claymes such Liberties. Secondly, It chargeth him with a tortious usurpation of them. And here in the principall Case he hath answered to the usurpation of them; but hee doth not answer, nor shew by what title he clayms them. And the like Case was adjudged here in this Court; That *Non usurpavit modo & forma* was no sufficient Answer. The Case was adjourned.

Mich. 28, 29. Eliz. in the Common Pleas.

Intratutur Trinit. 28. El. Rot. 256.

A Lease was made to *A. B.* and *C.* upon Condition that they nor any of them should alien without licence: And the Lessor made a Licence that *A. B.* or *C.* might alien: the same is a good licence, notwithstanding the uncertainty; and thereby they have severall authorities to alien: As a Letter of Attorney to *A.* or *B.* to make Livery; but a gift to *A.* or *B.* is void for the uncertainty. But if a licence be to *A.* and *B.* or *C.* some conceived that *A.* or *B.* might alien; but not *C.* *Et converso*.

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

105

IT was agreed by the whole Court, That a Partition made by word betwixt Joyntenants, is not good. See *Dyer* 29. *Pl.* 134. and 350. *Pl.* 20. doth agree; and see there the reason of it.

Mich. 28, 29. Eliz. in the Common Pleas.

105

IT was holden by the whole Court, That if the Father do devise Lands unto his Son and Heir apparant, and to a stranger, that it is a good Devise; and that they are Joyntenants for the benefit of the Stranger.

Mich. 28, 29. Eliz. in the Common Pleas.

106

FULLER'S Case.

A. Promises unto the eldest son, that if he will give his consent that his Father shall make an Assurance unto him of his Lands, that he will give him ten pounds: If he give his assent, although no assurance be made, yet he shall maintain an Action upon the promise. But at another day *Periam* Justice said, that in that case the son ought to promise to give his assent, or otherwise *A.* had nothing, if his son would not give his consent. And so where each hath remedy against the other, it is a good Consideration. In *Hilary* Term after, *Fenner* spake in arrest of Judgment upon the speciall Verdict, That because that the Assumpsit is but of one part, and the other is at liberty, whether he will give his consent or not; that therefore although that hee do consent, that hee shall not recover the ten pounds. Also he said, That the promise was, that if hee would give consent that his Father should make assurance to him: and here the assurance is made to *A.* to the use of the Defendant and his Wife in taile, so as it varies from the first Communication; and also it is in taile. *Shuttleworth* contrary; in as much as he hath performed it by the giving of consent, then when he hath performed. It is not to the purpose, that he was not tyed by a
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crossed *Assumpsit* to do it; but if he had not given his consent, he should have nothing. At length Judgment was given for the Plaintiff. And *Periam* Justice said in this Case, That if a covenant be to make an Estate to *A.* and it is made to *B.* to the use of *A.* that he doubted whether that were good or not.

Mich. 28, 29 Eliz. In the Common Pleas.

Intra m. Hill. 28. Eliz. Rot. 1742.

107 WISEMAN and WALLINGER's Case.

A Man seised of two Clofes called Bl. Acre, makes a Lease of them rendring Ten Shillings rent: The Lessee grants all his Estate in one of them to *A.* and in the other to *B.* The Lessor doth devise all his Land called Bl. Acre in the tenure of *A.* and dieth. The Devisee brings an Action of Debt for the whole Rent against the first Lessee. And the Opinion of the whole Court was, That the Action would not lie, because they conceived, That but the Reversion of one Close passed, and also that the rent should not be apportioned in that Case, because a terme is out of the Statute; and a Rent reserved upon a Lease for years shall not be apportioned by the act of the Lessor; as where he takes a Surrender of part of it. But otherwise by Act in Law; as where the Tenant maketh a Feoffment in Fee of part of the Land, and the Lessor entrench. And at another day *Anderson* Chief Justice said, That if the Lessor of two Acres granteth the Reversion of one Acre, that the whole Rent is extinct.

Mich. 28, 29. Eliz. in the Common Pleas

108

A Lease for years is made of Land by Deed rendring Rent; the Lessee binds himself in a Bond of Ten Pound to perform all Covenants and Agreements contained in the Deed; the Rent is behind, and the Lessor brings an Action of Debt upon the Bond for not payment of the Rent; the Obligor pleads performance of all Covenants and Agreements; the Lessor saies, That the Rent is behind; it was holden, That it is no Plea for the Obligor to say, That the Rent was never demanded: But in this Bar he ought to have pleaded, That he had performed all Covenants and Agreements, except the payment of the Rents. And as to that, That he was alwayes ready to have paid it,

it, if any had come to demand it; but as the first Plea is, it was held not to be good. And as to the demand of the Rent, the Court was of opinion, That it was to be demanded, for the payment of the Rent is contained in the word [Agreements] and not in the word [Covenants]: and then if he be not to performe the Agreements in other manner then is contained in the Deed; of that agreement the Law saith, That there shall be a demand of the Rent: But if the Lessee be particularly expressed by covenant to pay the Rent, there he is bound to do it without any Demand.

Mich. 28, 29. Eliz. in the Common Pleas.

109 **HOLLENSHEAD** against KING.

T *Thomas Hollenshead* brought Debt against *Ralph King* upon a Recovery in a *Scire facias* in *London*, upon a Recognizance taken in the Inner or Ouster Chamber of *London*; and doth not shew, That it is a Court of Record; and that they have used to take Recognisances and Exception was taken unto the Declaration, and a Demurrer upon it; and divers Cases put, That although that the Judgement be void, that yet the Execution shall be awarded by *Scire facias*, and the party shall not plead the same in a Writ of Error. But *Periam* Justice took this difference, Where Execution is sued upon such a Judgement, and where Debt is brought upon it: for in Debt it behoves the Party that he have a good Warrant and ground for his Action, otherwise he shall not recover; but upon a voidable Judgement he shall recover, before it be reversed.

Mich. 28 & 29 Eliz. In the Common Pleas.

Intratnr Trinit. 28. Eliz. Rot. 507.

110 **COSTARD** and **WINGFIELD's** Case.

IN a Replevin, the Defendant did avow for Damage Feasans by the commandment of his Master the Lord *Cromwell*: The Plaintiffe by way of Replication did justifye the putting in of his Cattell into the Land, in which, &c. by reason that the Towne of N. is an ancient Town, and that there hath been a usage, time out of mind, That every Inhabitant of the same Towne had had common for all his cattel Levant and Couchant in the same Town; and so justified the putting

in

in of his cattell. The Defendant said, That the house in which the Plaintiffe did inhabite in the same Towne, and by reason of Residency in which house he claimed common, was a new house built within 30 years, and within that time there had not been any house there; and upon that Plea, the Plaintiffe did demurr in Law. *Shuttleworth* Serdeant for the Plaintiffe, That he shall have common for cause of Resiance in that new house; and the Resiance is the cause and not the Land, nor the Person; and to that purpose he cited 15 E. 4. 29. And he agreed the Case, That if the Lord improve part of the Common, that he shall not have common for the Residue, because of the same Land newly improved; for he cannot prescribe for that which is improved by 5. Aff. 2. But here he doth prescribe not in the person, or in, or for a new thing; but that the usage of the Towne hath been, That the Inhabitants shall have common, and that common is not appendent, nor appertinent, nor in grosse, by *Needham* 37 H. 6. 34. b. Besides he said, That if the house of a Freeholder who hath used to have such common fall down, and he build it up again in another place of the Land, that he shall have common as before. And he put a difference betwixt the case of *Estovers*, and this Case; where a new Chimney is set up, for that makes a new matter of charge: and he much stood upon the manner of the Prescription. *Gandy* Serjeant contrary, and he took Exception to the Prescription; for he saith, that it is *antiqua villa*, and doth not say time out of mind; and such is the Prescription in 15 E. 4. 29. a. and if it be not a Town time out of mind, &c. he cannot prescribe that he hath used time out of mind, &c. And he said, That if it should be Law, that every one who builds a new house should have common, it should be prejudiciall to the Ancient Tenants, or impair the common: And so one who hath but a little land might build 20 houses, and so an infinite number, and every house should have common, which were not reason. *Anderson* chief Justice, He who builds a new house cannot prescribe in common, for then a prescription might begin at this day, which cannot be; and he insisted upon the generall loss to the ancient Tenants. *Periam* Justice, If it should be Law, that he should have common, then the benefit of improvement which the Statute giveth to the Lord shall be taken away by this means by such new buildings, which is not reason: So as all the Justices were of opinion, That he should not have common: but Judgement was respited untill they had copies of the Record. And *Hillary* Term following, the Case was moved again; and *Anderson* and *Periam* were of Opinion as they were before, and for the same reasons. But *Windham* Justice did incline to the contrary: But they did all allow, That he who new bulids an old Chimney shall have *Estovers*, so a house common. So if a house fall down, and the Tenant build it up again in another place. *Periam*, If a man hath a Mill and a Watercourse time out of mind, which he hath used to cleanse; if the Mill fall
O down,

down, and he set up a new Mill, he shall have the liberty to cleanse the Watercourse as he had before. And that Terme Judgement was given for the Defendant, to which *Windham* agreed.

Mich. 28, 29. Eliz. in the Common Pleas.

111

IN a Replevin, the parties were at Issue upon the Property, and it was found for the Plaintiff, and Damages intire were assessed; and not for the taking by it self, and for the value of the Cattell by themselves; for the Judgement upon that is absolute and not conditionall; and also if the Plaintiffe had the Cattell, the Defendant might have given the same in Evidence to the Jury, and then they would have assessed Damages accordingly, viz. but for the taking.

Mich. 28, 29. Eliz. in the Common Pleas.

112

A. bargaines with *B.* for twenty Loads of Wood, and *B.* promises to deliver them at *D.* if he fail, an Action upon the Case lieth. But *Perriam* Justice said, That upon a simple contract for wood upon an implicative promise, an Action upon the Case doth not lie. *Rodes* Justice, If by failer of performance the Plaintiff be damnified, to such a sum; this Action lieth.

Mich. 28, 29. Eliz. in the Common Pleas.

113

A Lease of Lands is made excepting Timber-Woods, and Underwoods. And the question was, Whether Trees *Sparfim* growing in Hedge rows and Pastures, did passe. And difference was taken, betwixt Timber-wood being one Wood, and Timber Woods being severall Words (although it bee *Arbor dum crescit, lignum dum crescere nescit*) yet in common speech that is said Timber, which is fit to make Timber. Then it was moved, Who should have the Lops and Fruits of them, and the Soile after the cutting of them downe; and also the Soile after the Under Woods; and as to that, a difference was taken, where the words are generally, All
woods;

woods; and where they are his woods growing. And in speaking of that case, another case was moved; *viz.* If a stranger cut down woods in a Forrest, and there is no fraud or collusion betwixt him, and the owner of the Land; Whether the King should have them, or the owner of the Soile? And it was holden, That the owner of the Soile should have them; and yet the owner could not cut them downe, but is to take them by the Livery of one appointed by the Statute.

Mich. 28, 29. Eliz. in the Common Pleas.

114.

A. makes a Lease of Lands to *B.* for ten years, rendring rent. And *B.* covenants to reparaire, &c. Afterwards *A.* by his Will, deviseth, that *B.* shall have the Lands for thirty years after the ten years, under the like Covenants as are comprised in the Lease. *Fenner* moved it as a question, If by the Devise those which were Covenants in the first Lease, should be Conditions in the second; for they cannot bee Covenants for want of a Deed; And if they should not be Conditions the heir of the Lessor were without remedie, if they were not performed. A Devise for years paying ten pounds to a stranger, is a Condition, because the stranger hath no other remedy. *Gandy* Justice, By the Devise to him to do such things as he was to do by the Lease, makes it to be a Condition: which was in a manner agreed by all the other Justices. Yet *Periam* and *Rodes* Justices, said, That the first Lease was not defeisable for not performance of the Covenants; nor was it the intent of the Devisor, that the second should be so, notwithstanding that his meaning was, that he should do the same things: *Periam*, The Covenant is in the third person, *viz.* *Convenrum, & Aggreateum est.* And see 28. *H. 8. Dyer*, where the words, *Non licet* to the Lessee to assigne, make a Condition.

Mich. 28, 29. Eliz. in the Common Pleas.

115. BARBER and TOPESFEILD's Case.

A. being Tenant in taile of certain Lands, exchanged the same with *B. B.* entred, and being seised in Fee of other Lands, devised severall parcels thereof to others, and amongst the rest a particular estate unto his heir; *Proviso*, That he do not re-enter nor claim any

of his other Lands in the destruction of his Will. And if he do, that then the estate in the Lands devised to him to cease. *A.* dieth, his issue entreth into the Lands in taile, and waives the Lands taken in Exchange; and before any other entry, the heir of *B.* enters upon the Land which was given in Exchange; and the opinion of the whole Court was, That it was no breach of the Condition, because that was not the Land of the Devisee at the time of the devise; therefore, it was out of the Condition.

Mich. 28, 29. Eliz. In the Common Pleas.

116.

PLYMPTON'S Case.

AN Action of Debt was brought by one *Plympton* and his wife, Executors of one *Dorrington*, upon a Bond with Condition to perform Covenants, of an Indenture of Lease, whereof one Covenant was, That he should pay forty shillings yearly at the Feast of the *Annunciation*, or within fourteen days after. And the breach assigned was for not payment at such a Feast in such a year. The Defendant said, That hee paid it at the Feast; upon which they were at issue. And upon evidence given to the Jury, it appeared, That the same was not paid at the Feast, but in eight dayes after it was paid. And the opinion of the Court was, That by his pleading, that hee had paid it at such a day certain, and tendring that for a speciall issue, That hee had made the day part of the issue, and then the Defendant ought to have proved the payment upon the very day: But if the Defendant had pleaded, That hee paid it within the fourteen dayes, *viz.* the eighth day, &c. that had not made the day parcell of the issue; but then hee might have given evidence, that he paid it at another day, within the fourteen dayes: Then for the Defendant it was moved, That the Plaintiffe had not well assigned the breach; in saying that he had not paid it at the Feast; without saying, Nor within the fourteen dayes. But the Court said, That the Jury was sworn at the Barre, and bid the Councell proceed and give in their evidence; for the time to take exception was past.

Mich.

Mich.28,29. Eliz. in the Common Pleas.

117.

IT was the opinion of *Anderson* Chiefe Justice, and so entred by the Court, That if a Copie-holder doth surrender to him who hath a Lease for years of the Mannor, to the use of the same Lessee, That the Copie-hold estate is extinct: For the estate in the Copie-hold is not of right, but an estate at will, although that custome and prescription had fortified it. And *Wray* said, That it had been resolved by good opinion, That if a Copie-holder accept a Lease for years of the Mannor, that the Copie-hold estate is extinct for ever.

Mich.28,29. Eliz. in the Common Pleas.

118.

A *Nderfon* Chiefe Justice, and *Periam* Justice, being absent in a Commission upon the Queen of Scots, *Shuttleworth* moved this case to the Court. If the Queen give Lands in taile to hold in *Capite*, And afterwards granteth the Reversion, how the Donee shall hold? *Windham* Justice, and *Fenner* Serjant, The tenure in this case is not incident to the Reversion; and the Donee shall hold of the Queen, as in grosse; and so two Tenures in *Capite*, for one and the same Land. And thereupon, *Windham* Justice cited 30. H. 8. *Dyer* 45,46. That the Queen by no way can sever the tenure in chiefe from the Crown. And therefore, if the Queen do release to her Tenant in *Capite*, to hold by a penny, and not in *Capite*, it is a void Release; for the same is meerly incident to the Person and Crown of the Queen. But *Rodes* Justice, held the contrary, viz. That the Tenure in *Capite* doth not remain. But it was said by *Windham*, That if the Queen had reserved a Rent upon the gift in taile, the Grantee of the Reversion should have it; Also he said, That the Queen might have made the Tenure in such manner: viz. to hold of the Mannor, or of the Honor of *D. Shuttleworth*. If Lands holden of the Mannor of *D.* come to the King, may he give them to be holden of the Mannor of *S?* that should be hard. *Windham*, I did not say, That Lands holden of one Mannor may be given to be holden of another Mannor; perhaps that may not be; but Lands which is parcell of any Mannor, may be given. *Ut supra*.

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

119

Serjeant *Fenner* moved this Case: If Lands be given to the Husband and Wife, and to the heirs of their two bodies, and the Husband dieth leaving Issue by his Wife, and the Wife makes a Lease of the lands, according to the Statute of 32. H. 8. If the Lease be good by the Statute? *Windham* and *Rodes* Justices, conceived, that it is a good Lease. *Fenner*, The Statute saith, that such Lease shall be good against the Lessor and his Heirs; and the Issue doth not claim as Heir to the Wife onely, but it ought to be Heir to them both: and he cited the case, That the Statute of R. 3. makes Feoffments good against no heirs but those which claim onely as Heirs to the same Feoffors, &c. So here. *Rodes* Justice, There the word [only] is a word of efficacy; And *Windham* agreed cleerly, That the Lease should binde the issue by the said Statute of 32. H. 8.

Mich. 28, 29. Eliz. In the Common Pleas.

120

Walmesley Serjeant moved this Case, If a man deviseth Lands in taile, with divers Remainders over, upon condition that if any of them alien, or &c. that then he who is next heir to him to whom the land ought to come after his decease, if the said alienation had not been made, might enter, and enjoy the land as if he had been dead. (But *Ady* of the Temple said, That the words of the Devise are, viz. That if any of them alien, or &c. that then his estate to cease, and hee in the next Remainder to enter and retain the land untill the aliener were dead.) *Rodes* Justice, The Devise is good; and an estate may cease in such manner, so as it shall not be determined for ever, but that his Heir after him shall have it. And he put the case of *Scholastica*, *Plow. Com.* 408. where (*Weston* fo. 414.) was in some doubt, that if the Tenant in taile had had Issue, if the Issue should be excluded from the land; or whether hee should have the land by the intent of the Devisor? And therefore if it were necessary to shew that the Tenant in taile had not Issue? But *Dyer* said, that the words of the Will were, that such person and his Heirs who alien, or &c. should be excluded presently; so as the estate by expresse words is to be determined for ever. But it is otherwise in this Case. *Windham* doubted of the Devise. *Fenner* cited the Case,

22. E. 3. 19. Where a Rent was granted, and that it should cease during the Nonage of the Heir of the Grantee, and it was good. *Windham*, When a thing is newly created, he who creates it may limit it in such manner as he pleaseth. *Fenner* 30. E. 3. 7. *Dit.* 10. A Feoffment was made, rendring Rent, upon Condition that if the Rent be behinde, the Feoffor might enter, and retain *quousque*: there the estate shall be determined *pro tempore*, and afterwards revived again. *Windham*, There the Feoffor shall have the land as a distres, and the Free-hold is not out of the Feoffee. *Fenner*: The Book proves the contrary; for the Feoffor had an Action of Debt for the Rent.

Mich. 28, 29. Eliz. in the Common Pleas.

121

IN a *Formedon*, the Tenant pleaded a Fine with proclamations: The Plaintiff replied, No such Record. It was moved, that the Record of the Fine which remained with the Chyrographer, did warrant the Plea; and the Record which did remain with the *Custos Brevium* did not warrant the Plea: and both the Records were shewed in Court; and to which the Court should hold, was the question? *Shuttleworth*, To that which was shewed by the *Custos Brevium*: and he cited the Case of *Fish* and *Brocket*, where the Proclamations were reversed because that it appeared by the Record which was shewed by the *Custos Brevium*, that the third proclamation was alledged to be made the seventh day of June; which seventh day of June was the Sunday: and yet hee said, It appeared by the Record certified by the Chyrographer, that it was well done, and yet the Judgment reversed. *Rodes* Justice, There is no such matter in the same case. And 26. *El.* by all the Justices and Barons of the Exchequer, in such case the Record which remains with the *Custos Brevium* shall be amended, and made according as it is in the Record of the Office of Chyrographer. *Windham* agreed. And afterwards the said President was shewed, in which all the matter and order of proceedings was shewed and contained, and all the names of the Justices who made the Order. And by the command of the Justices it was appointed, that the said President should be written out, and should remain *in perpetuam rei memoriam*. And the reason of the said Order is there given, because the Note which remains with the Chyrographer is *principale Recordum*.

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

122.

AN Infant was made Executor, and Administration was committed unto another, *durante minore etate* of the Executor; and that Administrator brought an Action of Debt for money due to the Testator, and recovered, and had the Defendant in Execution; and now the Executour is come of full age. *Fenner* moved that the Defendant might be discharged out of Execution, because the Authority of the Administrator is now determined; and he cannot acknowledge satisfaction, nor make Acquittances, &c. *Windham* Justice, Although the Authority of the Plaintiff be determined; yet the Recovery and the Judgement do remaine in force. But perhaps you may have an *Audita querela*. But I conceive, That such an Administrator cannot have an Action; for he is rather as a Bayliff to the Infant Executor, then an Administrator. *Rodes* agreed with him, and he said, I have seen such a Case before this time, *viz.* Where one was bound to such a one to pay a certaine sum of money to him, his Heirs, Executors, or Assignes: And the Obligee made an Infant his Executor, and administration was committed during his minority, and the Obligor paid the money to that Administrator; And it was a doubt whether the same was sufficient, and should excuse him, or not. And whether he ought not to have tendred the money to them both. *Fenner*, That is a stronger Case then our Case: One who is Executor of his own wrong, may pay Legacies, and receive Debts, but he cannot bring an Action. *Windham*, Doth it appear by the Record, when the Infant was made Executor, and that Administration was committed as before? *Fenner*, No truely. *Windham*, Then you may have an *Audita querela* upon it. *Fenner* said, So we will. Note *Hil. 33. Eliz.* in the Exchequer. *Miller* and *Gores* Case, An Infant pleaded in a *Scire facias* upon an Assignment of Bonds to the Queen, That *Saint-Johns* and *Eley* were Administrators during his minority. And it was holden by the Court to be no plea. But he ruled to answer as Executor.

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

123

Suggestion was made, that a Coroner had not sufficient Lands within the Hundred; for which a Writ issued forth to choose another; and one was chosen. It was moved by Serjeant *Snag*, If thereby the first Coroner did cease to be Coroner presently, untill he be discharged by Writ. *Rodes* and *Windham* Justices, He ceases presently, for otherwise there should be two Officers of one Coronership, which cannot be. Also the Writ is *Quod loco I. S. eligi facias, &c. unum Coronatorem*; and he cannot be in place of the first, if the first do not cease to be Coroner. So if any be made Commissioners, and afterwards others are made Commissioners in the same cause, the first Commission is determined. *Snagg* said, That in the Chancery they are of the same Opinion; but *Fitz. Nat. Brevium* 163. *N. is*, That hee ought to be discharged by Writ.

Mich. 28, 29 Eliz. in the Common Pleas.

124

IN an Action of Debt brought against Lessee for years for rent; he pleaded, That the Plaintiff had granted to him the reversion in Fee, which was found against him. *Walmesley* Serjeant moved, Whether by that Plea he had forfeited his terme or not. *Rodes* and *Windham* Justices, He shall not forfeit his Term; and *Rodes* cited 33. *E. 3. Judgement* 255. Where in a Writ of Waste the Tenant claimed Fee, and it was found against him, that he had but an Estate for life, and yet it was no Forfeiture. *Fenner* and *Windham*, It is a strong Case, for there the Land it selfe is in demand, but not so in our Case. *Rodes*, The Tenant shall not forfeit his Estate in any Action by claiming of the Fee-Simple, but in a *Quid juris clamat*. *Walmesley* and *Fenner*, Where he claimes in Fee generally, and it is found against him, there perhaps hee shall forfeit his Estate; but where he shewes a speciall conveyance, which rests doubtfull in Law, it is no reason that his Estate thereby should bee forfeited, although it be found against him. *Rodes*, 6. *R. 2. Quid juris clamat* 20. The Tenant claimed by speciall conveyance, and yet it was a forfeiture. But in the principle

cipall Cafe at Bar, he and *Windham* did agree cleerly, That it was no forfeiture.

Mich. 28, 29 Eliz. In the Common Pleas.

125

AN Action upon the Cafe was brought, because that the Defendant had spoken these words, viz. That the Plaintiffe hath said many a Masse to *J. S. &c.* *Anderson* Chief Justice, *Prima facie*, did seem to incline, That no Action would lie for the words, although that a Penalty is given by the Statute against such Masse-Mongers. For he said, That no Action lieth for saying, That one hath transgressed against a Penall Law. *Periam* Justice contrary. *Anderson* If I say to one, That he is a disobedient Subject, no Action lieth for the words. *Windham* Justice, That is by reason of the generality. *Puckering*, No Action lieth for the flandering of one in a thing, which is but *malum prohibitum*. *Periam*, The saying of Masse is *Malum in se*. *Puckering*, If I say to one, That he hath eaten flesh on Fridayes, an Action doth not lie for that. *Periam*, Is that like this Cafe? Note, the Declaration was uncertaine, viz. The places where the Masses were said, &c. were not alledged, nor the day when they were said, &c. And therefore *Periam* said, that the Action did not lie, for it might be that the Masses were celebrated in *France*, or some other place out of the Kingdom: And the Statute doth not appoint any penalty, If they be not indicted thereof within the year and a day, &c.

Mich. 28, 29. Eliz. in the Common Pleas.

126

AN Act of Common Councill, according to the Custome of the City of *London*, was, By which it was Decreed, That none should bring any Sand, nor sell, nor use any within the City or Suburbs of *London*, but that only which was taken out of the River of *Thames*, &c. And that if any did the contrary, that he should forfeit for the first fault five Pound, and for the second fault Ten Pound, to be recovered in an Action of Debt, wherein no *Essoine*, Protection, or Wager of Law should be allowed. And such a Plaint, for the forfeiture of One hundred and twenty Pound, was removed out of *London* into the Common Pleas by a Writ of Priviledge: and it was debated amongst the Justices, and Serjeants, Whether the Plaint should be remanded or not. *Anderson* Chief Justice, *Windham* and *Periam* Justices, did great-ly

ly. speak against the said Act, not only for the matter and substance of the Act, but also for the forme of it. 1. They were informed by *Smagg* Serjeant, That the said Thames Sand was a great deal worse then the Land Sand, and yet the price of the same was greater, and the measure of it lesse: For of the Thames Sand there were but eleyen Bushels to make a Load: and of the other Sand there were eighteen Bushels, which, he said, was a very great Deceit and Mischief. And 2. they said, That is against reason, that any Freeman should be so restrained from Merchandizing and selling. And also it might concerne the Inheritances of some who might have Sand in their Lands. Also the said Justices said, That they were very presumptuous in making Acts so Parliament-like, viz. That no Essoine, Protection or Wager of Law should be allowed, &c. and that they did arrogate to themselves too high Authority: And they stirred up the Plaintiffe at the next Parliament to exhibite a Bill against them for it, and to sue them in the King's Bench for their presumption and insolency in that their dealing; and said, That it would shake their Liberties, and grow to a greater matter then they thought or were aware of. And thereupon *Anderson* cited the Case 22. H. 8. Where Sir *Edward Knightly*, Executor of Sir *William Spencer*, made certain Proclamations in certain Townes, That Creditors coming in; and proving their Debts; that they should be paid; and for that Presumption hee was committed to the Fleet, and was fined Five hundred Marks. And hee said, That such were the Misdemeanors of *Empson* and *Dudley*.

Mich. 28, 29. Eliz. in the Common Pleas.

127 BOXE and MOUNSLOWE's Case.

T *Thomas Boxe* brought an Action upon the Case against *John Mounslowe*, That the Defendant had slandered him, in saying, That the said *Thomas Boxe* is a Perjured Knave, and that he would prove, That he the said *Thomas Boxe* had forsworne himselfe in the Exchequer, &c. and supposed the said words to be spoken in London 4. Feb. 28. El. Et prædict^r *Johan. Mounslowe*, per *Johannem Lutrich*, *attornat^r suum venit & defendit vim & injuriam quando, &c. Et dicit quod prædict^r Thomas Boxe actionem suam versus eum habere non debet, quia dicit, quod prædict^r Thomas Boxe being one of the Collectors of the Subsidies before the speaking of the said words, viz. M. 27. and 28. Eliz. in Curia Seaccaris apud Westmst. did exhibit a Bill against the said *John Mounslowe*, containing, That the said *John* being assailed*

in ten pounds in goods. The said *Thomas Boxe* came to him, and demanded sixteen shillings eight pence, which the said *John Mounslow* did refuse to pay, &c. And that demand and refusall was supposed to be in *London* in *Breadstreet*. *Et pro verificatione premissorum ad tunc & ibidem Sacramentum corporale per Barones prefatus Thomas Boxe prestito*. The said *Thomas Boxe* swore the said Bill in substance was true, *ubi revera* the said *John Mounslow* did not refuse, &c. *per quod* the said *John Mounslow* postea, viz. *prædicto tempore quo &c. dixit de prefato Thoma Boxe prædicta verba, &c. prout ei bene licuit*. The Plaintiffe replied, that the Defendant spake the words of *injuria sua propria*, *absque Causa* per prefatus *Johannem Mounslow superius allegata, &c.* *Et hoc petit quod inquiretur per Curiam: Et prædicti defendens similiter*. And a *Venire facias* was awarded to the Sheriffe of *London*, and it was found for the Plaintiffe, and damages four hundred pound. And now it was moved in arrest of judgement, that there was no good triall, nor the issue well joyned; for the issue doth consist upon two points tryable in severall Counties: viz. the Oath which was in the Exchequer, and that ought to have been tried in *Middlesex*, and the matter which he affirmed by his oath to be, viz. the demand and refusall to pay the Subsidie, &c. and that was alledged to be in *London*, and therefore is there to be tried; And the issue viz. *de injuria sua propria absque tali causa* goeth to both; for the *ubi revera* will not mend the case, as *Periam* Justice said, and both are materiall; for the Defendant ought to prove, that the Plaintiffe made such oath, and also that the substance and matter of the oath was not true, for otherwise the Plaintiffe cannot be proved perjured. And therefore the Counties here (if they might) should have joyned in the triall. And the opinion of the Court was against the Plaintiffe; for *Anderson* and *Windham* said, That if this issue could have been tried by any one of the Counties without the other, It should be most properly and naturally tried in *Middlesex*, where the oath was made; for the perjury (if any were) was in the Exchequer. But they said, that the issue here was ill joyned, because it did arise upon two points triable in severall Counties, which could not joyne: whereas the Plaintiffe might have taken issue upon one of them well enough, for each of them did go to the whole; and if any of them were found for the Plaintiffe, that he had sufficient cause to recover. *Gandy* moved, that it should be helped by the Statute of *Joynsailes*, which speakes of mis-joyning of issues: *Anderson*, the issue here is not mis-joyned; for if the Counties could joyne, the issue were good: but because that the Counties cannot joyne, it cannot be well tried: But the issue it selfe is well enough. *Windham* and *Rodes* were of the same opinion, that it was not helped by the Statute: but *Periam* doubted it. *Anderson* said, That if an issue triable in one Countie be tried in another, and judgement given upon it, it is error.

And

And afterwards *Lutrich* the Attorney said, That it was awarded, that they should re-plead, *Nota quia mirum*: for 1. The Statute of 32. H.8. Cap.30. speaks of mis-joyning of processe, and mis-joyning of issues; and admit that this case is not within any of those clauses, each of them being considered by it selfe; yet I conceive, it is contained within the substance and effect of them, being considered together. Also I conceive, That it is within the meaning of both Statutes, viz. 32. H.8. Cap.30. and 18. Eliz. Cap. 14. for I conceive the meaning of both the Statutes was to oust delays, circuits of actions and molestations, and that the partie might have his judgement, notwithstanding any defect, if it were so, that notwithstanding that defect, sufficient title and cause did appeare to the Court. And here the Plaintiffe hath sufficient cause to recover, If any of the points of the issue be found for him. For if it bee found, that the matter and substance of the oath be found true (which might be tried well enough by those in *London*) the Plaintiffe hath cause to recover; Wherefore I conceive, that the verdict in *London* is good enough, and effectuell: And note, That *Rodes* said, that hee was of Councill in such a case in the Kings Bench betwixt *Nevell* and *Dent*.

Mich. 28, 29. Eliz. in the Common Pleas.

128

IN an Action of Trespasse, the Defendant pleaded, that at another time before the Trespasse, he did recover against the same Plaintiffe in an *Ejectione firme*, and demanded judgement. And the opinion of the whole Court was, That it is a good plea, *prima facie*, and that the possession is bound by it; for otherwise the recovery should be in vaine and uneffectuell. And *Anderson* chiefe Justice, said, That if two claime one and the same Land by severall Leases, and the one recovereth in an *Ejectione firme* against the other; that if afterwards the other bring an *Ejectione firme* of the same Land, the first recovery shall be a barre against him. *Rodes* said, That hee can shew authority, that a recovery in an *Ad terminum quem prateriit* shall bind the possession.

Mich. 28, 29. Eliz. in the Common Pleas.

129

IN Trespasse, the Defendant did justifie as Bailiffe unto another, The Plaintiffe replied that he took his cattell of his own wrong; with-

without that that he was his Bailiffe. *Anderſon* chiefe Juſtice, If one have cauſe to diſtreine my goods, and a ſtranger of his own wrong, without any warrant or authority given him by the other, take my goods not as Bailiff, or ſervant to the other. And I bring an Action of treſpaſſe againſt him; can he excuſe himſelf, by ſaying, that he did it as my Bailiffe or ſervant? Can he ſo father his miſ-demeanours upon another? He cannot; for once he was a treſpaſſer, and his intent was manifeſt. But if one diſtrein as Bailiffe, although in truth, he is not Bailiffe; if after he in whoſe right he doth it, doth aſſent to it, he ſhall not be puniſhed as a treſpaſſour; for that aſſent ſhall have relation unto the time of the diſtreſſe taken; and ſo is the book of 7. H.4. And all that was agreed by *Periam. Shuttleworth*, What if hee diſtraine generally, not ſhewing his intent, nor the cauſe wherefore he diſtrained? &c. *ad hoc non fuit reſponſum.* *Rodes* came to *Anderſon*, and ſaid unto him, If I having cauſe to diſtrain, come to the Land, and diſtraine, and another ask the cauſe why I do ſo? if I aſſigne a cauſe not true or inſufficient, yet when an Action is brought againſt me, I may avow or juſtifie, and aſſigne any other cauſe. *Anderſon*, That is another caſe; but in the principall caſe clearly the taking is not good; to which *Rodes* agreed.

Mich. 28, 29. Eliz. in the Common Pleas.

130 HOODIE and WINSOMB'S Caſe.

IN an Attaint brought by *Hoodie* againſt *Winſcombe*, &c. One of the Grand Jury was challenged, becauſe he was a Captain, and one of the Petie Jury, was his Lieutenant; And it was holden by the whole Court, that that was no principall challenge. *Windham*, It hath been holden no principall challenge, notwithstanding that one of the Jurours was Maſter of the Game, and one of the Petit Jury was Keeper of his Park. And in that caſe, it was holden by all the Juſtices, That if a man make a Leaſe, rendring rent upon condition, that if the rent be behind, and no ſufficient diſtreſſe upon the Land, that then the Leſſor may re-eater; If the Rent be behind, and there be a piece of lead, or other thing hidden in the Land, and no other thing there to be diſtrained, the Leſſor may re-eater; for the diſtreſſe ought to be open, and to be come by; for if it ſhould be otherwiſe ſaid a ſufficient diſtreſſe, one might incloſe money, or other things within a wall; and thereby the Leſſor ſhould be excluded of his re-entry.

Mich.

Mich. 28, 29. Eliz. in the Common Pleas.

131

IN a *Quare Impedit*, the Plaintiff counted, That the Defendant being Parson of the Church in question, was presented to another Benefice, and inducted 15 Aprilis, and that the other Church became void, &c. The Defendant said, That he was qualified at such a day, which was after 15 Aprilis, without that, that he was inducted 15 Aprilis. And the Court was of opinion (*Anderson* being absent) that it was no good Traverse, for he ought to have said generally; without that, that he was inducted before the day in which he is alleged to be qualified. As if one declare in Trespasse done 1 Aprilis, and the Defendant plead a Release 1 Feb. he ought to traverse without that, that the Trespasse was done before the Release, by *Periam* Justice.

Mich. 28, 29. Eliz. in the Common Pleas.

132

HALES and HOME's Case.

IN an Avowry for Damage feasant, one pleaded a Lease made unto him by *I. S.* the other said, that before the Lease, *I. S.* did enfeoff him; the other replied and maintained the said Lease *absque hoc quod J. S. seisisse feoffavit*. Gaudy, The Traverse is not formall, for the word *seisisse* is idle, and ought to be left out; for he cannot enfeoff if that he were not seised; and it hath never been seen that the seisin in such Case hath been traversed; but generally in Pleading the Traverse hath been *absque hoc*, that *Feoffavit*, without speaking of seisin, which is superfluous. And so was the opinion of the whole Court.

Mich. 28, 29. Eliz. in the Common Pleas.

133

THE Queen granted Lands unto the Earle of Leicester by her Letters Patents; the Patentee made a Lease of the Land unto another. *Shawlesworth* moved it to the Court, Whether the Patentee ought to shew the Letters Patents; and he conceived, He need not, because he hath not any interest in them, but the same do belong only to the Earle. As if a Rent be granted to one in Fee, and he taketh a wife and dieth

eth, and the Wife bringeth a Writ of Dower, she is not bound to shew the first Deed by which the Rent was granted to her Husband, because the Deed doth not belong unto her. So hee who sues for a Legacie, is not tied to shew the Will, because the same belongs to the Executor, and not him. *Periam* Justice, The Cases are not alike, for they are Strangers and not Privies, but the Lessee in the principall Case deriveth his interest from the Letters Patents, and therefore he ought to shew them. *Rodes* Justice remembered *Throgmorton's* Case, *Com. 148. a.* where a Lease was made by an Abbot to *J. S.* and afterwards the same Abbot made a Lease unto another to begin after the determination of the first Lease made to *J. S.* and exception was taken, That he ought to have shewed the Deed of the first Lease, and the Exception was disallowed by the Court. *Periam*, That case, is not like this case; and he said, That, as he conceived, the Lessee in this case ought to shew forth the Letters Patents; and if any Books were against his Opinion, it was marvellous.

Mich. 28, 29 Eliz. in the Common Pleas.

134

ONE intruded after the death of Tenant for life, and died seised, and the land descended to his Heire; and a Writ of Intrusion was brought in the *Per* against the Heir; and *Gawdy* Serjeant prayed a Writ of Estrepment against the Tenant. And first the Court was in doubt what to do; but afterwards when they had considered of the Statute of *Gloucester, Cap. 1.* in the end of it, *Anderson* said, If the Writ be in the *Per*, take the Writ of Estrepment; but if the Writ be not in the *Per*, we doubt whether a Writ of Estrepment will lie or not.

Mich. 28 & 29 Eliz. In the Common Pleas.

135 WOOD against ASH and FOSTER.

Certain Lands with a Stock of Sheep was leased by Indenture; and the Lessee did covenant by the same Indenture, to restore unto the Lessor at the end of the Terme, so many Sheep in number as he took in Lease, and that they should be betwixt the age of two and four years. Afterwards the Lessee granted the same Stock unto a Stranger, viz. to *Elizabeth Winsor*, who was the wife of *Ash*; whereas in truth,
all

all the ancient Stock was spent. And it was holden by all the Justices upon an Evidence given unto a Jury at the Bar, That when such a Stock of Sheep is leas'd for years, the principall Property doth remain in the Lessor, as long as those Sheep which were in esse at the time of the Lease, should live; but if any of them do die, and other come in their roomes, then the property of those new Sheep doth belong to the Lessee; and therefore they held, that the second Lessee should have so many of the Sheep as were left, and did remaine at the end of the Lease, and no other. And yet it was objected by *Walmesley*, That the Stock was entire, and that as soon as any other came in the room of the ancient Sheep which were dead, that they were accounted part of the same stock; and although they be all dead, and so changed successively two or three times; yet (he said) it shall be said the same stock. And he resembled the same to the case of a Corporation, which although all the Corporation die, and other new men come in their places, it shall be said the same Corporation. But notwithstanding his Opinion, all the Justices were of opinion as before. *Walmesley* said, That agreeing with his opinion was the opinion of all the civill Lawyers: but the Court was angry, and rebuked him, that he did in such manner crosse their opinions, and that he cited the opinion of Civilians in our Law; and they resolved the contrary; and they said, there is a difference betwixt the Lease of other Goods; and a lease of live Cattel; for in the first Case if any thing be added for mending, repairing, or otherwise by the Lessee, at the end the Lessor shall have the additions, for of them he hath alwayes the property, and they are annexed to the principall; but Lambs, Calves, &c. are severed from the principall, and are the Profits arising of the Principall, which the Lessee ought to have, else he should pay his Rent for nothing: And as to the issue upon the *Cepit* by *Foster*, it was shewed, That he did but stay the Sheep in his Manor, where he had Felons Goods, Waifes, and Strayes, and that the Sheep were stayed upon a Huy and Cry; and that he had taken Bond of one, to whom he had delivered the Sheep, to render them to him who had the right of them. And that stay was holden by the Court to be out of the point of the Issue; For that he who doth stay, doth not take.

Mich. 28, 29. Eliz. in the Common Pleas.

136 **The Heirs of Sir ROGER LEWK NOR
and FORD's Case.**

Intrauit Pasch. 28. El. Rot. 826.

SIR Roger Lewknor, seised of *Wallingford Park*, made a lease thereof unto Ford for years, and died: the Lessee granted over his term to another, excepting the Wood: the term expired; and now an action of Waste was brought against the second lessee by the two Coparceners and the Heir of the third Coparcener, her Husband being tenant by the courtesie. And *Shustleworth* and *Snag* Serjeants did argue, that the action would not lie in the form as it was brought. And the first Exception which was taken by them was, because the action was generall, viz. *Quod fecit Vastum in terris quas Sir Roger Lewknor pater pradii' the plaintiffs, cujus heredes ipsa sunt, prafat' defend' demisit, &c.* and the Count was, that the Reversion was entailed by Parliament unto the Heirs of the body of Sir Roger Lewknor; and so they conceived, that the Writ ought to have been speciall, viz. *cujus heredes de corpore ipsa sunt.* For they said, that although there is not any such form in the Register, yet in *navo casu novum remedium est apponendum*: And therefore they compared this case to the case in *Fixz. Nat. Brevium* 57. c. viz. If land be given to Husband and Wife, and to the Heirs of the body of the Wife, and the Wife hath issue and dieth, and the Husband committeth Waste, the Writ in that case and the like, shall be speciall, and shall make speciall recitall of the estate: And so is the case 26. H. 8. 6. where *Cestuy que use* makes a lease, and the lessee commits Waste: the action was brought by the Feoffees, containing the speciall matter; and it was good, although there were not any such Writ in the Register, *cujus heredes de corpore*: and we are not to devise a new form in such case, but it is sufficient to shew the speciall matter to the Court. Also the words of the Writ are true; for they are Heirs to Sir Roger Lewknor: and the count is sufficient pursuant and agreeing to their Writ: for they are Heirs, although they are not speciall Heirs of the body: and so the Court was of opinion that the Writ was good, notwithstanding that Exception. And *Anderson* and *Periam* Justices, said, That the case is not to be compared to the case in *F. Nat. Br.* 57. c. for there he cannot shew by whose Deemise the Tenant holdeth, if he doth not shew the speciall conveyance; viz. that the land was given to the Husband and Wife, and the Heirs of the body of the Wife: Nor is it like unto the case of 26. H. 8. 6.

for

for the same cause : for alwayes the demise of the Tenant ought to be especially shewed and certainly ; which it cannot be in these two cases, but by the disclosing of the Title also to the Reversion. Another Exception was taken, because that the Writ doth suppose *quod tennerunt*, which (as they conceived) is to be meant, that *tennerunt* joyntly ; whereas in truth they were Tenants in common. *Walmesley* contrary ; because there is not any other form of Writ : for there is not any Writ which doth contain two *Tennerunts*. And the words of the Writ are true, *quod tennerunt*, although *tennerunt* in Common. But although they were not true, yet because there is no other form of Writ, it is good enough. As *Littleton*, If a lease be made for half a year, and the Lessee doth waste, yet the Writ shall suppose, *quod tenet ad terminum annuorum* : and the count shall be speciall, 40. *Ed. 3. 41. E. 3. 18.* If the Lessee doth commit waste, and granteth over his term, the Writ shall be brought against the Grantor, and shall suppose, *quod tenet* ; and yet in truth, he doth not hold the Land. 44. *Ed. 3. and Fitz.* If one make divers leases of divers lands, and the Lessee doth waste in them all, the Lessor shall have one Writ of waste supposing *quod tenet* ; and the Writ shall not contain two *Tenants* : And such was also the opinion of the Court. The third Exception was because that the Writ was brought by the two coparceners, and the Heir of the third coparcener, without naming of the Tenant by the Courtesie. And thereupon *Snagg* cited the Case of 4. *Ed. 3.* That where a Lease is made for life, the Remainder for life, and the tenant for life doth waste, he in the Reversion cannot have an Action of waste during the life of him in the Remainder. So in this case, the Heir of the third coparcener cannot have waste, because the mean estate for life is in the Tenant by the courtesie : And to prove that the Tenant by the courtesie ought to joyn, he cited 3. *E. 3.* which he had seen in the Book it self at large, where the Reversion of a tenant in Dower was granted to the Husband, and to the Heirs of the Husband, and the tenant in Dower did waste, and they did joyn in an Action of waste, and not good. And so is 17. *E. 3. 37. F. N. B. 59. f. and 22. H. 6. 25. a. Walmesley* contrary : for here in our case, there is nothing to be recovered by the tenant by the courtesie, for he cannot recover damages, because the disinheritance is not to him ; and the term is expired, and therefore no place wasted is to be recovered : and therefore it is not like unto the Books which have been cited ; for in all those the tenant was in possession, and the place wasted was to be recovered, which ought to go to both according to their estates in reversion. But it is not so here ; for in as much as the term is expired, the land is in the tenant by the courtesie, and so he hath no cause to complain. And such also was the opinion of the whole Court, viz. that because the term was ended, that the Writ was good notwithstanding the said Exception.

116 *Heirs of S^r R. Lewkner & Ford's Case.*

Then concerning the principall matter in Law, which was, Whether the Writ were well brought against the second Lessee, or whether it ought to have been brought against the first Lessee; It was argued by *Shuttleworsh*, that it ought to have been brought against the first Lessee; for when he granted over his term, excepting the trees, the Exception was good: *Ergo, &c.* For when the Land upon which the trees are growing, is leased out to another, the trees passe with the Lease as well as the Land, and the property of them is in the Lessee during the term; and therefore when he grants his term, hee may well except the trees, as well as the first Lessor might have done. And that is proved by the Statute of *Marlebridge*, Cap. 23. for before that Statute the Lessee was not punishable for cutting downe the trees, and that Statute doth not alter the properties of the trees, but onely that the Lessee shall render damages if he cut them down, &c. Also the words of the Writ of Wast proveth the same, which are, viz. *in terris, domibus &c. sibi dimissis*. Also the Lessee might have cut them down for reparations, &c. and for fire-wood, if there were not sufficient underwoods; which he could not have done, if the trees had been excepted. And in 23. H.8. in *Brooke*, It is holden, that the excepting of the trees, is the excepting of the Soile. And so is 46. E.3. 22. Where one made a Lease, excepting the woods, and afterwards the Lessee did cut them down, and the Lessor brought an Action of Trespasse *quare vi & armis clausum fregit, &c.* and it was good, notwithstanding that Exception was taken to it. And it is holden in 12. E. 4. 8. by *Fairfax* and *Littleton*, That if the Lessee cut the trees, that the Lessor cannot carry them away, but he is put to his Action of Wast. *Fenner* and *Walmesley* Serjeants contrary: and they conceived, that the Lessee hath but a speciall property in the trees, viz. for fire-boot, plough-boot, house-boot, &c. And if he passe over the Lands unto another, that he cannot reserve unto himselfe that speciall property in the trees, no more then he who hath common appendant can grant the principall, excepting and reserving the Common; or grant the Land, excepting the foldage. The grand property of the trees doth remain in the Lessor, and it is proved by 10. H.7. 30. and 27. H.8. 13. &c. If Tenant for life, and he in the reversion, joyne in a Lease; and the Lessee doth wast, they shall joyne in an Action of Wast, and Tenant for life shall recover the Free-hold, and the first Lessor the damages; which proves that the property of the trees is in him. As to that that he was dispunishable at the common law, that was the folly of the Lessor; and although it was so at the common law, yet it is otherwise at this day. For when the Statute sayes, That the Lessor shall recover damages for the Wast, that proves sufficiently that the property of the trees is in him, as the Statute of *Merton* Cap. 4. enacts. That if the Lessor do approve part of the Wast, leaving sufficient for the Commoners.

ners; and they notwithstanding, that bring an Assize, they shall be barred in that Case; and the Lord may have an Action of Trespass against them if they break the Hedges by force of that Statute, as it hath been adjudged; for the intent of the Statute, was to settle the Inheritance of the Land approved without interruption of the Commoners: And so in this case. But Note, that by the Statute of *Marlebridge*, the Lessor shall recover damages for the houses, &c. which are wasted, &c. and yet a man cannot inferre thereupon, that therefore the Lessee hath no Interest or property in them; and such interest hath he in the trees, notwithstanding the words of the Statute, (which is contrary to this meaning, as it seems.) And therefore *Quere*, If there be any difference betwixt them, and what shall be meant by this word [Property.] But the damages are given by the Statute in respect of the property which the Lessor is to have in reversion, after the Lease determined. *Anderſon* Chief Justice, The Lessor hath no greater property in the trees, then the Commoner hath in the soile. *Walmesley*, 2. H. 7. 14. and 10. H. 7. 2. The Lessor may give leave to the Lessee to cut the trees, and the same shall be a good plea in an Action of Wast; and the reason of both the books, is, because the property of them is in the Lessor; and to this purpose the difference is taken in 2. H. 7. betwixt Gravell and trees. 42. H. 3. If a Prior licence the Lessee to cut trees, the same shall discharge him in Wast, brought by the Successour. But if the Lessee cutteth down the trees, and then the Prior doth release unto him, the same shall not barre the Successour; and so is 21. H. 6. Also he cited *Culpepers* case, 2. Eliz. and 44. E. 3. *Statham*, and 40. Ass. 22. to prove that the Lessor shall have the Wind-falls. If a stranger cutteth down trees, and the Lessee bringeth an Action of Trespass, he shall recover but according to his losse, viz. for lopping and topping. As to that which was said, That if the Lessee cut down trees, that the Lessor cannot take them away, that is true. for that there is a contract of the Law, that if the Lessee do cut them down, that he shall have the trees; and the Lessor shall have treble damages for them. Also he said, That the trees are no part of the thing demised, but are as servants, and shall be for reparations. As if one hath a Piscarie in the land of another man, the land adjoyning is as it were a servant, viz. to drie the Nets; So, if one have conduit-pipes lying in the land of another, he may dig the land for to mend the pipes, and yet he hath no Interest, nor Free-hold; To that which was said, That by the excepting of the trees, the land upon which they stood is excepted; It is true, as a servant to the trees, for their nourishment, but not otherwise; for if the Lessor selleth the trees, he afterwards shall not meddle with the land, but it shall be wholly in the Lessee, *quia sublata causa, tollitur effectus*; And if the Lessee tieth a horse upon the land, where the trees stood the Lessor may distraine the same for his rent, and avow as upon land

118 *Heirs of S^r R. Lookner & Ford's Case.*

land within his distress, and Fee, and holden of him; And he said, that the lessor may grant the trees, but so cannot the lessee; and therefore he said, That the property is in the lessor, and not in the lessee: Also if the lessor granteth them, they passe without Attornment: But contrary, if the lessor had but a Reversion in them: Also if the lessor cutteth them down, his Rent shall not be apportioned, and therefore they are no part of the thing demised: For 16. H. 7. and *temps E. 1. Fitz. Waste*, in two or three places it is holden, That if the Waste be done *Sparsim* in a Close or Grove, the lessor shall recover the whole: Then admit that the trees excepted are cut down *sparsim*; if the Exception shall be good, how shall the thing wasted be recovered, and against whom? *quod non.* *Anderson* Chief Justice did conceive that the Exception was void, and that the Action was well brought; and he said, It was a Knavish and Foolish demise; and if it should be good, many mischiefs would follow, which he would not remember. *Windham* Justice was of the same opinion, and he said, The lessor might have excepted them, and so take from the lessee his fire wood and Plough bote, &c. But the lessee could not grant his estate excepting the trees, because he had but a speciall interest in them, viz. for his fire-bote, &c. which shall go with the land. *Periam* Justice agreed, That as to such a speciall property, none can have it, but such a one who hath the land; and therefore the exception of the Wood by the lessee was void. But as to the other things, perhaps if they were Apple trees, or other Fruit-Trees, the exception had been good. Also although the trees are not let directly, yet they are after a sort by a mean, as annexed to the land; and if the Action be brought against him who made the exception, he cannot plead that they were let unto him, and therefore he doubted of the exception. *Rodes* Justice also said, That he doubted of the Exception: And he said, That the Book of 44 E. 3. is, That the lessee should have the Wind-falls, and he did not much regard the Opinion of *Statham*. But *Anderson* Chief Justice was of opinion, that the lessor should have the Wind-falls. Note, the Case was not adjudged at this time.

Hill. 29. Eliz. in the King's Bench

137

EXceptions were taken by *Fuller* to an Indictment upon the Statute of 1. *Eliz. cap. 2.* for the omitting of the Crossing of a Child in Baptizing of him. The Case was, That a Minister out of his Cure, at another Church, viz. at *Chelmsford* in *Essex*, did Baptize a Child without the

the Sign of the Crosse; for which he was indicted. The first Exception was, That the Statute speaks of Ministers which do not use the administering of the Sacrament in such Cathedrall Churches, or Parish Churches, as he should use to administer the same; that this was not the Parish Church in which he should use the same. *Sine* Justice was of opinion, That it was good, notwithstanding that; for otherwise the Statute might be greatly defrauded. The words of the Statute are farther [Or shall wilfully or obstinately, standing in the same, use any other Rule, Ceremony, Order, Forme, &c.] 2. He took another Exception upon those words; For the omitting of the Crossing only is put, and it is not shewed that he used any other rite or Ceremony, &c. for there ought to be some Positive thing. 3. He doth not shew the Place or Parish where he persisted in it, and that is materiall and issuable. The fourth Exception was, Because it was *Inquisitio capta coram Johanne Peter, Waltero Mildmay*, and so named four of them, by vertue of a Commission directed to them and to others, and doth not shew what others, *nec quod illi fuerunt presentes*; and then if the Commission were to them all jointly, and two only were present, then it was *coram non iudice*; and so void. 5. The Statute saies, That if any Parson or Vicar; but doth not say, being *Minister Dei*. The sixth was, That it was at another Church, &c. *Wray* Chief Justice, If this Evasion should be allowed, the Statute were not to the purpose. The seventh was, That it doth not shew where the persisting was, for that is a speciall thing, and materiall and issuable. *Wray* Chief Justice conceived, That that only was a materiall Exception, and that the other Exceptions were but frivolous; and were not good.

Hill. 29. Eliz. In the Kings Bench.

138 WARREN'S CASE.

ONE *Warren* demanded by a Writ of Debt in the Common Pleas Forty Pound, and upon his Declaration did confess himselfe satisfied of Twenty Pound, and thereupon Error was brought in the King's Bench: And the Judgement reversed, because by his Declaration he had abated his Writ; and he ought to have Judgement according to his Writ, and not according to his Declaration. The Error assigned was in the Outlawry; and it was holden by all the Justices, That if the principall Record be reversed for Error, that the Outlawry which is grounded upon it shall be reversed also.

Hill.

Hill. 29. Eliz. in the Kings Bench.

139

R O O T E ' S C a s e .

THE Case was in a Prohibition touching Tithes; and the libell in the Spirituall Court was for Corn and Hay, and other things: and the Tenant of the land did prescribe to pay in one part of the land, the third part of the tenth; and in another part, the moiety of the tenth of Corn, for all manner of Tithes. And the Court did incline that the same was a good prescription. And a Prohibition was granted to the Ecclesiasticall Court.

Hill. 29. Eliz. in the King's Bench.

140

A Man was possessed for the terme of six years of a Tavern in *London*, and leased the same unto another for three years; and it was covenanted betwixt them, that during the three years, *quolibet mense*, monthly the lessee should give an Account to the lessor of the Wine which he sold, and should pay unto him for every Tun sold, so much money. And afterwards the lessor granted the three years which were remaining of the six years to another; and he did request the lessee to account, and he would not; whereupon he brought an Action of Covenant; and the Defendant pleaded, That he had accounted to the Assignee of the three years: and upon that there was a Demurrer joyned. And the better opinion of the Court was, that it was no Plea, because it was not a Covenant, which did go with the land, or the Reversion; but was a collaterall thing, and did not pass by the assignment of the three years.

Hill. 29. Eliz. in the King's Bench.

141

IT was adjudged. That the bringing of a Writ of Error to reverse a Fine by an Infant, during his nonage, is not sufficient; but the Fine by Judgement in the Writ of Error must be reversed during his Nonage.

Hil.

Hill. 29. Eliz. in the Common Pleas.

142 WIDALL and Sr. JOHN ASHTON'S CASE.

A Writ of Error was brought by *Widall*, against *Sr. John Ashton*, because in the other action being an action of Wast: The Plaintiff there did declare, that he was seised, and so seised *demisit pro termino annorum, &c.* and did not shew of what estate he was seised; And yet he did suppose that it was *ad exheredationem ejus, &c.* And the same by *Beaumont* was taken for an exception: as 7. H. 6. A man pleaded a Feoffment to two & *heredibus*, and doth not say, *suis*, it is uncertain: And in the principal Case it shall be supposed, that he hath but an estate for life, for it shall not be intended that he hath an estate of Inheritance, without expressing of words to carry an Inheritance. As 7. Ass. If I grant a Rent to *I. S.* and do not name what estate he shall have in it, he shall have but an estate for life. But he said, that the Presidents are, that if the word [seised] had been left out, it had been good enough; For by the Book of Entries, a man may say [demisit] without saying that he was seised & *demisit*: But if a man will plead a thing which is not necessary to be pleaded, and mistake it, it shall make his Plea naught: as in *Partridges Case*: Where a suite was upon the Statute of Maintenance. It is sufficient to say, *contra formam Statuti*. But if he will plead specially, the day and place of the Statute, and mis-plead it, it makes all naught. *Suit* Justice, I conceive that, that is a fault incurable. But upon the other side it was argued, that in 21. H. 7. It is holden, that he might plead *quod demisit*, without that, that he was seised and *demisit*, as there in an Action of Debt. And therefore it is but surplusage in the principal Case. *Vide* 15. E. 4. A good Case, where surplusage shall not hurt, because it is not traversable: And he urged that by the Statute of 18. El. the Declaration doth not abate for matter of form: And he said that Counts and Declarations shall be taken by Intendment; and it shall be intended, that if he bringeth Wast, that he hath such an estate, that he may maintain such Action. In *Adams Case*, in the Commentaries, One shewed that such an Abbot was seised, and that the Land came unto the King by Dissolution, and that the King being seised, did grant the same, and did not shew of what estate the King was seised, and yet it was holden good. See a good Case to this purpose, 18. E. 3. *Formedon* 58. And he said that the Defendant had pleaded *Nul wast fait*, and therefore he had by his Plea affirmed the Declaration to be good. *Beaumont*, He ought to have said, *reversione inde sibi & heredi-*

dibus, &c. *Clenche* Justice, I conceive that the Statute of 18. *El.* helps that. *Suis* Justice, No truly. It was adjourned.

Hill. 29. Eliz. in the Common Pleas.

143

AN Action of Covenant was brought by a Man, against another who had been his Apprentice. The Defendant pleaded that he was within age. The plaintiff did maintain his Action by the Custome of London: Where one by Covenant may binde himself within age; And Exception was taken to it, That that was a Departure. *Daniel*, It is no Departure, for by 18. R. 2. an Infant brought an Action against *Gardian* in Socage, and the *Gardian* pleaded, that the plaintiff was within age; And the plaintiff did maintain his Declaration, that by the Custome of such a place, An Infant of 18. yeares might bring an Action of Account against his *Gardian* in Socage, and it was there holden to be no Departure. I conceive, that an Infant cannot have an Account against his *Gardian*, before his full age: But I conceive that they held, that it was by Statute, That an Infant should not have an Account against *Gardian* in Socage, until he was of the age of 21. yeares. *Wray* Chief Justice was of opinion, that it was no Departure; For he said, it should be frivolous to shew the whole in his Declaration, viz. That he was an Infant; And that by Custome he might make a Covenant which should binde him; But *quare* of his opinion, for that many doubt of it. *Vide* the Case 118. R. 2.

Hill. 29 Eliz. in the King's Bench

144 CONEY'S CASE

AN Action of Trespass was brought against *John Coney*, for digging of the plaintiffs Close, and killing of 18. Cones there: The Defendant Pleaded as to all the Trespas, but killing of two Cones, Not Guilty; And as to them he said, that the place where &c. the Trespass is supposed, is a Heath in which he hath common of pasture, and that he found them eating of the Grasse, and that he killed them and carried them away, as it was Lawfull for him to do, &c. *Cook*, The Point is; Whether a commoner having common of pasture, may kill the Cones which are upon the ground; and he said, he might not. And first,

first he said, it is to be considered what interest he who hath the Freehold, may have in such things as are *fera Natura*. Secondly, What authority a commoner hath in the ground in which he hath common: To the first, he said, that although such Beasts are *fera Natura*, yet they are reduced to such propertie when they are in my ground, by reason of my possession, which I then have in them, that I may have an action of Trespass against him who takes them, as 42. E. 3. 24. If one have Deer in his Park, & another taketh them away, he may have an action of Trespass for the taking. 12. H. 8. If a Forrester follow a Buck, which is chased out of the Park or Forrest, although that he who hunteth him, killeth him in his own ground, yet the Forrester or Keeper may enter into his ground, & retake the Deer, for the propertie and possession which he hath in it by the pursuit. 7. H. 6. 38. It is holden, that if a wilde Beast go out of the Park, then the owner of the ground hath lost the propertie in it. *Brook* thereupon collects, that he had a propertie in it whilst it was in his Park. 18. E. 4. 14. It is doubted whether a man can have propertie in things which are *fera Natura*; But 10. H. 7. 6. It is holden, that an Account lieth for things *fera Natura*. *Vide* 14. H. 8. 1. The Bishop of London's Case, and 22. H. 6. 59. as long as they are in his ground, they are in his possession, and he shall have an Action of Trespass for the taking of them, and the Writ shall be *damus suas*, by *Newton*. And in the Register 102. It is *Quare ducent's cuniculos suos precij &c. cepit*. But it is said, that he hath common there: What then? Yet he cannot meddle with the Wood, Sand, Grass, but by taking of the same with the mouthes of his Cattel: If he who hath the Freehold bring an action against the Commoner for entring into his Land; If he plead, Not guilty, he cannot give in Evidence, that he hath Common there. 22. Aff. A Commoner cannot put in Cattel to Agist: So is 12. H. 8. And of late it was holden in this Court, That where the Commoners did prescribe, that the Lord had used to put but so many of his Cattel upon the Lands; That it was a void prescription. *Godfrey*, Contrary. That it is Lawfull for the Commoner to kill them: And he agreed the Cases which were put by *Cook*. And he said, that the owner of the ground had not the very propertie, but a kind of propertie in them. 3. H. 6. and *F. N. B.* If the Writ of Trespass be, *Quare cuniculos suos, &c.* The Writ shall abate; And yet he hath a propertie in them, or rather a possession of them. I grant, that against a stranger he might have this Action of Trespass, but not against the Commoner: for he hath a wrong done unto him, by their being upon the Land, and therefore he may kill them, although he may not meddle with the Land, because he hath not an Interest in it; and yet he may meddle with the profit of it: as 15. H. 7. A Commoner may distrain damage feasant. 43. E. 3. Coneyes dig the Ground and eate the Grass of the Commoner, &c. I grant, that it is not lawfull for the Tenant for life for to kill the Coneyes of him, who

hath a free Warren in the ground. For if a man bring an Action of Trespas, *Quare Warranem suum intravit & cuniculos suos cepit, &c.* It is no Plea, that it is his Free-hold. *L. 5. E. 4.* In Trespass, *Quare clausum fregit & cuniculos cepit.* The Defendant said, that the plaintiff made a lease at will unto such a man, of the Land; and he as his Servant did kill the Coneyes, and it was holden no Plea, and yet it is there said, that by the grant of the Land the Coneyes doth not pass; but the reason (as I conceive) is, because it tends to his damage, and therefore that he may kill them. And so in this Case, *2. H. 7.* and *4. E. 4.* If I have Common of pasture in Land, and the Tenant plougheth the Land, I shall have my Action upon the Case in the Nature of a *quod permittat.* *9. E. 4.* If one hath Land adjoining to my Land, and levy a Nuisance; I may enter upon his Land and abate the Nuisance. So if a man take my goods and carrie them into his own Land, I may enter thereupon and retake my goods. So if a Tenant of the Freehold plough the Land, and sow the same with Corn, the Commoner may put in his Cattel, and there whilteate the Corn growing upon the Land, and may justifie the same, because the wrong first begins by the Tenant; So if a man do falsly imprison me, and put me in his house, I may break his house to get forth. *21. H. 6.* in Trespass, All the Inhabitants of such a Town do prescribe to have Common in such a field every year after harvest: And one froward fellow amongst the rest will not gather in his Corn within convenient time, If the Townsmen put in their Cattel, and they eat the Corn, he hath no remedie for it; And he asked what remedie the Commoner should have for the eating of the Grasse, which his Cattel is to have, if he should not kill the Coneyes? He cannot take them damage feassants, for he cannot impound them; Nor doth a Replevin lye of them. *19. E. 3.* and *F. N. B.* If the Lord surcharge the Common, the Commoner may have an Action against him: but in this Case, he can have no Action. *Gandy,* Chief Justice. He cannot kill the Coneyes, because he may have other remedie. *Suir Justice,* A Commoner cannot take or distrain the Cattel of a Freeholder damage feassants; And therefore he cannot kill or destroy the Coneyes, and he hath a remedie; for he may have an Action upon the Case, or an Assize against him for putting in of the Coneyes, if he do not leave sufficient Common, for the Commoner. Judgment was afterwards given for the Plaintiff.

Hill. 29. Eliz. in the King's Bench.

145 YARRAM and BRADSHAWE'S Case.

YArram and Wilkenson, Sheriffs of the City of Norwich, brought an Action upon the Case against Bradshawe, because that they being Sheriffs of *N.* A *Capias ad satisfaciendum* (and shewed at whole Suit, and in what action) was awarded unto them; And they, 20. Feb. Anno 25. *El.* directed their Warrant in writing to three Sergeants of the same City to arrest him; by force of which the Sergeants the 26. of Feb. in the same year, did Arrest him in Execution, and that he was rescued and escaped: And that they had spent divers summs of Money in enquiring after him, *ad grave damnum eorum*, &c. The Defendant pleaded, Not Guilty; And upon Tryal of the issue, a special Verdict was found, that about 20. Feb. Anno. 25. such a Warrant was made by them unto the Sergeants, but not 20. Feb. and that the Sergeants by force thereof, about 26. Feb. did Arrest him, but not the 26. of Feb. and upon the whole matter, there was a demurrer in Law. Tanfield, for the Defendant, and he said, It was no Lawfull Arrest. For by 8. E. 4. A Bailiff without a Warrant in writing may take goods in Execution, and it is good, if it be by commandment, by word onely of the Sheriff; but he cannot Arrest the body of a man without a Warrant in writing, & *sigillo signatum*, which is not shewed here in the plaintiffs Declaration: If one in debt declare *per factum suum obligatorium*, and doth not say, *sigillo suo sigillatum*, it is not good. *Quare* of that, for the Book of Entries is not so. Secondly, he said, it must be a present loss or damage to the plaintiffs, or else they cannot maintain the action: They are chargeable, but not charged; for if the Sheriffs dye before he begin any Suit against them, their Executors shall not be charged: But if the plaintiffs have been Arrested, then they are endamaged. Thirdly, as to the Verdict, the foot and foundation of the action is the wrong; and the wrong here is not found certain; for it is supposed to be 26. Feb. And also that the Warrant was *Circa* 26. Feb. but not 26. Feb. and if it were any day before, then the action is maintainable; but not, if it were any day after. A man brings an action, of Trespass, supposing by his writ the same to be done 1. May; If in truth the Trespass was before, then it is good, but if it were 2. May. or at any time after 1. May, then it is not good. It was a great Case betwixt Vernon and Gray, in an *Ejectione firme*, The Ejectment was supposed 1. May, and the Jury did finde the Ejectment to be *Circa* first May, and adjudged not good. If an *Ejectione firme* be brought upon a lease made 1. May, and the Jury finde the Ejectment to be *circa* 1. May, it is not good. Also here they could not take him in Execution again, although they

they had found him. For if a man be once out of Execution; by 14th H. 7. He shall not be taken again in Execution for the same cause. The Court held it not material whether he shewed or not that the Warrant was *sub sigillo sigillat'*, and therefore thy did not speak to it. *Godfrey*, for the plaintiff, 'What if they be not charged, but chargeable? yet they shall have their action upon the Case, for the wrong done. viz. The Rescous and the Escape, because the Defendant shall not take advantage of his own wrong; and so is the opinion of *Frowick* 13. H. 7. 1. Reporter. *Quare*, For *Frowick* saith, He shall have an action upon the Case or Trespas for breaking of prison, against him, and shall recover in damage as much as he lost by the escape, and so he shall be helped, and not by taking of him again: And *Fitzherbert*, in his *Natura Brevium*, in the Writ of *Ex parte talis*, holds, that upon an Escape the Gaoler shall have a special Writ upon the Case against the Prisoner to answer for the Escape, and the damages which the Gaoler shall sustain thereby: and it was holden in a great Case, viz. *One Holes Case*: That it is not necessary to shew that there was a recovery against them. *Tanfeild*, but there it was after a Suit begun, although before recovery. *Godfrey*, they have also put it in their Declaration, that they have expended great sums of Money in looking for him; therefore they have shewed that they were damnified. *Tanfeild*, it was foolish for them to spend their Money, for they could not have taken him again, although they had found him. *Godfrey*, A man shall have an action for fear of vexation, or trouble, or charge, as one shall have a *Warrantia Charta*, before he be impleaded. A man shall have a *Curia Claudenda*, before any breach of the enclosure: As to the Verdict, It is certain enough, for it saith, *Quod tunc & ibidem seipsum recessit*; and that cannot but be referred to a time certain before. viz. 26. Feb. *Tanfeild*, It shall be referred to *circa*, and therefore *ad tunc & ibidem* do remain uncertain. *Swir Justice*, Presently by the escape, there was a wrong done, therefore for that he may have an action: *Clenehe Justice* said, That he had experience in a Case of Trespas: And it was the opinion of almost all the Judges of *England*, That if the Trespas should be done after the day wherein it is supposed to be done by the Writ; Yet the Writ shall not abate, and therefore he said, That the difference of the Trespas done before and after the day supposed by the Writ, is to no purpose: Further he said, that it standeth them upon to have their action before they be sued by the party, at whose Suit he was in Execution: for perhaps, he who was in Execution might dye, and other changes might happen, so as they might lose all. *Tanfeild*, What damages shall the Sheriffs have here, if they shall recover before any action be brought against them, when as it is uncertain whether ever they shall be sued or not; and so uncertain how much they shall be damnified? But notwithstanding all which was said by *Tanfeild*, Judgment was given for the Plaintiffs.

Hill.

Hill. 29. Eliz. in the Common Pleas.

146

LONDON doth prescribe to have a Custom, That after Verdict given in any of the Sheriffs Courts, or such like Court there, that the Maior may remove any such Suit before himself, and as Chancellor *secundum bonam & sanam conscientiam* moderate it, and it was moved, whether it were a reasonable custom or not, because that after tryal by ordinary course at Law, he should thereby stay judgment. Gandy Justice, it ought to be before judgment, otherwise it cannot be, for the Statute of 4. H. 4. is, that judgment given in any Court shall not be reversed, but by Error or Attaint; *Vide Rasfal, Tit. Judgment.*

Mich. 28. Eliz. in the Common Pleas.

Rot. 2619.

147

GREENE and HARRIS Case.

IN an *Ejectione firme* upon a special Verdict, it was found, that one John Brenne was seised of a Manor where there were Copyholders for life, and by Indenture leased a copyhold called Harris Tenure, parcel of the Land in question, to Peter and John Blackborow, for eight years, to begin after the death of Brenne & his Wife; and by the same Indenture leased all the Manor to them as before: The Copyholder did surrender, and Brenne granted a copy to hold according to the custom of the Manor. Brenne and his Wife died: So as the lease of Blackborow was to begin; Peter entred and granted all his Interest unto a stranger, and died. John entred into the whole as Survivor, and made a lease thereof to the Plaintiff, and the Copyholder entred, and he brought the action. Shuttleworth for the plaintiff: The question is, whether the plaintiff shall have Harris Tenure, as in gross, or as parcel of the Manor? and he conceived, that because it is named by it self, that it shall pass as in gross; for so their intent appeareth to be. In 33. H. 8. Dyer 48. A Feoffment was made of a Manor to which a Villein was Regardant, by these words, viz. *Dedi unam acram, &c.* And further, *Dedi & concessi Villanum meum*: and there it was holden that the Villein should pass as in gross, and that they were several gifts, although there was but one Deed. The same Law shall be of an Advowson appendant. 14. and 15. El. Dyer. Husband and Wife

Wife were joint-tenants in Fee of a Manor out of which the Queen had a Rent of twenty pound *per annum*, and she by her Letters patents, in Consideration of Money paid by the Husband, did give, grant, release, and remise unto the Husband and his heirs the said twenty pound Rent, *habendum & percipiendum* to him and his heirs; The Husband did devise the Rent unto another and his heirs, and dyed: There it is debated, whether the Wife should pay the Rent or not; and it was holden that she should pay it, for the deed having words of grant and release, it shall be referred to the Election of the Husband, and for his best avail how he will take it; and there is no necessity that the Rent be extinguished in his possession; for it is a maxime in Law, that every grant shall be taken beneficially for the grantee: to is it, if it contain words of two intents, he may take that which makes best for him. 21. and 22. H. 6. A deed comprehending *Dedi & concessi*, was pleaded as a Feoffment. In 5. E. 3. A Rent issuing out of Lands in Fee was granted to Tenant by the courtesie, to have and to hold to him and his heirs; It shall not be taken as extinct, but the Rent shall go to his heires, although he himself could not have it; Then in our Case, because it is more beneficial for the Termor, he shall have it in gross; And so he shall avoid the Estate of the Copyholder afterwards; and here is an Election made by *Peter* so to have it by the grant of his Interest over. Our Case is not like unto the Case of 48. E. 3. 14. Where a *Cessavit* was brought, supposing that the House was holden of the Plaintiff by five Shillings, and the Defendant pleaded, that the Ancestor of the Plaintiff, by his deed, which he shewed forth, gave the house to him and a shop, which are holden by one intire service, and demanded judgment, &c. And there it was holden, that that deed did not prove, but that the shop might be parcel of the house, and not a shop in gross by it self. And there *Finchdon* saith, That if a man grant the Manor of *F.* to which an Advowson is appendant, and the Advowson of the Church of *F.* so as it is named in gross, yet it shall pass as appendant; I yeild to that, for there it is not more beneficial for him the one way or the other, as it is in our Case. It may be perhaps objected, That the Plaintiff here shall not recover at all for the cause alleadged in *Pl. Comm.* 424. in *Bracebridges Case*, because that the action is brought for a certain number of Acres, as one hundred Acres, and it is found that the Plaintiff hath right but to a moyty of them: But it hath been ruled against that; viz. that he shall recover. *Walmesley* Sergeant contrary. Notwithstanding that this Copyhold be twice named; yet it shall pass as parcel of the Manor, and not as a thing in gross, and there is but one Rent, one Tenure, and one reversion of both. 45. E. 3. A Fine was levied of a Manor unto which an Advowson was appendant, wherein a third part was rendred back to one for life, with divers Remainders over,

And

And so of the other two parts, with the advowson of every third part, as abovesaid; and there it is debated who shall have the first avoidance. And it is holden notwithstanding the Division as abovesaid, and the naming of one before the other, that they are all Tenants in common of it: So as if they cannot agree to present, that Lapse shall incurr to the Bishop; and there no Prerogative is given to him who is first named, nor any prejudice to the last named; for being by one Deed, it shall passe *uno flatu*. 14. H.8. 10. A Lease was made for a year, *Et sic de anno in annum*, &c. And there it was debated, whether it were a severall Lease for every year; and it was ruled, That an Action might be brought, supposing that he held for one and twenty years, if in truth by force of the same Demise the Lessee occupy the Land so long: And if I by my Deed grant unto *A.* and *B.* the services of *I. D.* and by the same Deed the services of *I. S.* are also granted unto them, they are Joyn-tenants of the Services or Seignories: So if I lease a Manor, reciting every parcell of the Land of the Manor, for the whole consists in severall parcels; In 33. H.8. (before remembrance,) It is said, That the Advowson shall be appendant, if the whole Manor be granted, &c. But if it be admitted that there be severall Leases, and that it passeth as a thing in grosse; yet in the *interim* during the life of *Brenne*, and his wife, it is one entire Manor. For if *Blackborow* had levied a Fine thereof before entry, his Interest in the Land had not passed. And if a Fine be levied of the Manor, and the Conusee render back part to one for life, and another part to another for life, the remainder of the whole to a third; until the Two enter, it is one entire Manor in the hands of the Conusee. If I devise that my Executors shall sell such Lands which are parcell of a Manor, and dye; untill they sell, it remains parcell of the Manor: So if the heir selleth the Manor, that Land shall passe, for it is but executory, and remains parcell untill it be executed. Wherefore in the principall Case here, the Copy-hold is good. The reason of the Case 33. H.8. *Dyer* 48. is, because before the grant, the advowson was not appendant to that acre onely, but to the whole Manor, and to that acre as parcell of it. Also he said, that the Copy-hold shall be good against the Lessee, being granted before execution of his term, when as the Manor was entire: For he who hath a Manor but for one year, may grant Copies, and the grant shall be good to bind him in the Reversion. And if one recovereth an acre, parcell of a Manor before execution, it is parcell of the Manor, and by grant of the Manor shall passe. *Periam* Justice, But yet now being executed by the death of the Lessor and his wife, it is no part of the Manor if they be severall Leases. *Walmesley*, But the Defendant is in by Custome, by one who is *Dominus pro tempore*. *Anderson* Chief Justice, The Case of 48. E.3. is like our Case. And I conceive clearly here is no severance; but if there had

been any severance, it had been otherwise; but I doubt of the other point. *Periam* Justice, In 13. *H.4.* the difference is taken betwixt a grant of a Manor *nus cum advocacione*; and a grant of a Manor, *et ulterius*, a grant of the Advowson. In 14. *Eliz. Dyer* 311. in the Case of the Lord *Cromwell* and *Andrews*, it is moved, If a man bargain and sell, give and grant a Manor and Advowson to one, and afterwards levieth a Fine, or inrolleth the Deed, *Dyer* held, that the Advowson shall passe by the Bargain and Sale, as in grofs before that the Deed be enrolled. But I conceive, that it cannot pass if the Deed be not enrolled, and then it shall pass as appendant, by reason of the intent of the parties: and so in this Case. And for the last matter, I conceive, very strongly, that when the Lease which is executory takes effect, that it shall avoid the Copy-hold; for although at once, *viz.* during the expectancy of the said Lease, to begin at a day to come, the Copy-hold be not extinct; yet now he may say, That all times, as in respect to him, the Copy-hold Custome was broken. I hold, That a Tenant in Dower shall not avoid a Copy-hold made during the Coverture; and so it hath been adjudged in the Kings Bench. But I conceive, there is a difference betwixt that Case, and the Case in question; for in that Case the title of the wife to have Dower is not consummate till the death of the Husband. *Anderson* Chief Justice, I can shew you an Authority, That if I grant unto you such Land, and the Manor of *D.* there the Land shall pass as parcell of the Manor. *Periam*, True there, for it doth enforce the first grant. But here the intent of the parties doth appear, and the same is to be respected. *Anderson*, But their intent ought to be according to the Law: as in 19. *H.8.* it is holden it shall be in a Devise. *Anderson*, upon the Argument of this Case, said, That if a Warranty be to a whole Manor, and also to an Advowson, the party cannot have Two Warrantia Charia. *Periam*, If he had further said in the Deed, That his intent was that it should be severall, the same had altered the Case. *Anderson*, No truly; because his intent did not stand with the rule of Law. As if a man devise that his Lands shall be sold, and doth not say by whom, it is void, and yet the intent is expressed. If the Lease had been by severall Deeds, *Periam* said, The Copy-hold had beene severed. *Windham* denied that, If both the Deeds bee delivered at one time. It was adjourned.

Hill. 29. Eliz. In the Common Pleas.

148

AN Information was upon the Statute of 5. & 6. E. 6. for buying of seed Corn, having sufficient of his own, and not bringing so much unto the Market of his own corn; and a generall issue was found upon it: And it was delivered for Law to the Jury by the Justices, That a Contract in Market, for corn not in the Market, or which was not there that day, is not within the Branch of the Statute. But if corn or graine be in the Market, although that the Contract be made in a house out of the Market, and delivered to the Vendee out of the Market, yet it is within the Statute. And in the Argument of that Case, *Anderson* said, That the Market, shall be said, The place in the Town where it hath used to be kept, and not every place of the Town; And a Sale in Market overt in *London*, ought to be in a Shop which is open to the street, and not in Chambers or inward rooms, otherwise the property is not altered. And so it is of all Statutes in open Markets. And the Recorder of *London* said, That such was their Custome in *London*.

Hill. 29. Eliz. in the Common Pleas.

149

It was holden by *Anderson* chiefe Justice, That if one deviseth Lands to the heirs of *I. S.* and the Clerk writes it to *I. S.* and his heirs, that the same may be holpen by averment, because the intent of the Devisor is written, and more; And it shall be naught for that which is against his intent, and against his will, and good for the residue. But if a Devise be to *I. S.* and his heirs, and it is written but to the heirs of *I. S.* there an averment shall not make it good to *I. S.* because it is not in writing, which the Statute requires: and so an averment to take away surplufage is good, but not to encrease that which is defective in the Will of the Testator.

S 2

Mich.

Mich. 29. Eliz. in the Common Pleas.

150

A Feoffment was made unto *A.* unto the use of him, and his wife, dis-punishable of Wast during their lives; one died, and the Survivor committed Wast; It was the opinion of the whole Court, that an Action of Wast would not lie by him in the Reversion; for it is a Priviledge which is annexed to the Estate, which shall continue as long as the Estate doth continue.

Mich. 29 Eliz. in the Common Pleas.

151

A. grants *annualetn redditum* out of Lands in which he hath nothing. The opinion of the Court was, That it is a good grant of an Annuity by these words (*annualetn redditum.*) But whether the Husband shall have a Writ of Annuity after the death of the wife for an Annuity, during the Coverture, they were in some doubt; because it is but a thing in Action, as is an Obligation: Otherwise were it of a Rent which she had for life: Note, in pleading for a Rent, he shall plead, That he was seised, &c.

Mich. 29. Eliz. in the Common Pleas.

152 WINKFEILD'S CASE.

Winkfeild devised Land in *Norfolk*, to one *Winkfeild* of *London*, *Goldsmith*, and to his heirs in Fee. And afterwards, he made a Deed of Feoffment thereof to divers persons unto the use of himselte for life, without impeachment of waste, the Remainder unto the Devisee in fee. But before he sealed the Deed of Feoffment, he asked one, if it would be any prejudice to his Will; who answered, No. And the Devisor asked again, if it would be any prejudice, because he conceived that he should not live untill Livery was made. And it was answered, No. Then he said, that he would seale it, for his intent was, that his Will should stand; And afterwards Livery was executed upon part of the Land, and the Devisor died. *Rodes*
and

and *Periam* Justices; The Feoffment is no Countermand of the Will, because it was to one person: but perhaps it had been otherwise, if it had been to the use of a stranger, although it were not executed. *Anderson* Chiefe Justice, and others, the Will is revoked in that part where the Livery is executed. And he said, It would have been a question, if he had said nothing. And all the Justices agreed, That a man may revoke his Will in part, and in other part not. And he may revoke it by word; and that a Will in writing may be revoked by word. *Periam* said, It is no revocation by the party himselfe, but the Law doth revoke it; to which *Windham* agreed. But he said, That if the party had said nothing when he sealed the Feoffment, it had been a revocation of the party, and not of the Law. *Periam*, If the Witnesse dye, so as he cannot prove the words spoken at the sealing of the Feoffment, the Feoffment will destroy the Will; and so he spake to *Anderson*, who did not deny it. All this was delivered by the Justices upon an Evidence given to a Jury at the Barre.

Mich. 29. Eliz. in the Common Pleas.

153

NOte; That it was said by *Anderson* Chiefe Justice. That if one intrude upon the possession of the King, and another man entred upon him, that he shall not have an Action of Trespasse; for he who is to have trespassse, ought to have a possession; and in this case he had not, for that every Intruder shall answer the King for his time; and therefore he shal not answer to the other party: To which, *Walmesley* and *Fenner*, Serjeants agreed. *Periam* doubted of it; for he conceived, That he had a possession against every stranger. *Snagg* Serjeant conceived, That he might maintain an Action of Trespasse; but *Windham* and *Rodes* Justices, were of opinion that he could not maintain Trespass. *Walmesley*, he cannot say in the Writ, *Quare clausum fregit*, &c. *Rodes* vouched 19. E.4. to maintain his opinion.

Mich. 29. Eliz. in the Common Pleas.

154 NORRIS and SALISBURIE's Case.

IN an Action of Debt upon a Bond, the Case was this, *Norris* was possessed of wools, for which there was a contention betwixt the Defen-

Defendant, and one *A.* And *Norris* promised *A.* in consideration that the goods were his; and also that he should serve processe upon *Salisbury* out of the Admiral Court, that he would deliver the goods to *A.* And afterwards he delivered the goods to *Salisbury* the Defendant, who gave him Bond with Condition to keep him harmlesse from all losses, charges and hinderances, concerning and touching the said wools. Afterwards *A.* served processe upon him, and he did not deliver to him the goods: for which *A.* brought his Action upon the Case against *Norris*, who pleaded, That he made no such promise, which was found against him. And afterwards, *Norris* brought an Action of Debt upon the Bond against *Salisbury*, because he did not save him harmlesse in that Action upon the Case. And the opinion of the whole Court was, That the Action of Debt would not lie, because that the Action upon the Case did not concern the wools directly; for the Action is not brought but for breach of the promise; And that is a thing of which the Defendant had not notice, and it was a secret thing not concerning the wools. but by circumstances, and so out of the Condition. *Anderson* Chiefe Justice said, That if *A.* promise *B.* in Consideration, that *B.* is owner of goods, and hath them, to deliver them to *C.* the same may be a good consideration; yet he somewhat doubted of it. But *Walmesley* did affirme it to be a good Consideration.

Mich. 29 Eliz. in the Common Pleas.

155

IT was holden by the whole Court, That in an Action of Trespasse, It is a good plea in barre, That the Plaintiffe was barred in an Assize, brought by him against the Defendant, and issue joyned upon the Title; But otherwise, if it were upon the generall issue; viz. *Nul tort, nul disseisin*; For then it might be that the Plaintiffe was never ousted nor disseised; and so no cause to recover: In which case, it was no reason to put him from his Writ of Right.

Mich.

Mich. 29. Eliz. in the Common Pleas.

Intratur Mich. 27. Rot. 1627.

156

B R A G G's Case.

A Woman having cause to be endowed of a Manor in which are Copy-holders, doth demand her Dower by the name of certain Messuages, certain Acres of land, and certain Rents; and not by the name of the third part of the Manor, and she doth recover, and keeps Courts, and grants Copy-holds: It was holden by the whole Court, that in such Case that the Grants were void, for she hath not a Manor, because she hath made her demand as of a thing in grosse. Otherwise, if the demand had been of the third part of the Manor, for then she had a Manor, and might have kept Courts and granted Copies. And the pleading in that Case was, That she did recover the third part of the Manor *per nomen* of certain Messuages, and Acres, and Rents; which was holden to be no recovery of the third part of the Manor.

Hill. 29. Eliz. in the Common Pleas.

157

Note, it was holden for Law, That the Justices may increase, but not decrease damages, because the party may have an Attaint, and so is not without remedy. But note, contrary by *Anderson* and *Periam* Justices.

Hill. 39. Eliz. in the Common Pleas.

158

Serjeant *Fenner* moved this Case, That the Lord of a Manor doth prescribe, That if the Tenant do a Rescous, or drive his Cattel off from the Land when the Lord comes to distrain, that the Tenant shall be amerced by the Homage; and that the Lord may distrain for the same. *Anderson* Chief Justice did conceive it might be a good custome: and so also was the opinion of *Rodes* Justice; and he vouched 11 H. 7. where the Lord had Three Pound for Pound-breach. *Fenner*, It is extortion, if the amercement be not for a thing which is a common Nusance;
• and

and cited 11 H. 4. to prove it. *Periam* Justice said, That hee said well.

Pasch. 28 Eliz. In the Common Pleas.

Rot. 1962.

159 GILE'S and NEWTON'S Case.

THE Case was, That the Queen seised of the Manor of *Gascoigne*, and of the Graunge called *Gascoigne* Graunge in D. did grant all her Lands, Tenements, and Hereditaments in D. and it was adjudged by the whole Court, that the Manor did not pass. And so *Anderson* Chief Justice said it is, if it were in the Case of a common person; but an Advowson shall passe by the Feoffment of the Manor without Deed, without the words *cum pertinentiis*, for that is parcell of the Manor; which the whole Court granted.

Pasch. 23. Eliz. in the Common Pleas.

-160

J. S. was arrested by force of a *Latitat* out of the King's Bench, at the Suit of *J. D.* and the Sheriffe took an Obligation of him with two Sureties, upon condition that he appear such a day in the King's Bench, and also that *ad tunc & ibidem* he answer the said *J. D.* in a Plea of Trespass. It was moved by *Rodes* Serjeant, That the Obligation was void by the Statute of 23. H. 6. by which Statute no Obligation shall be said to be good, if not for appearance only; and this Obligation is for appearance, and also that he shall answer to *J. D.* which is another thing then is contained in the Statute, and therefore it is void. But all the Justices were of opinion, That the Obligation was good, notwithstanding that; because that the words of the Writ directed to the Sheriffe, are *Quod capias* such a man, *Ita quod habeas corpus ejus hic*, such a day, *ad respondendum tali*, in a Plea of Trespass; and so nothing is contained in the Bond, which is not comprised within the Writ directed unto him, but if any other collaterall thing be put into the Obligation, then the Bond shall be void for the whole.

31. *Eliz.*

31. Eliz. in the Common Pleas.

161 BUCKHURST'S Case.

LEssee for ten years granted a rent charge unto his Lessor for the years: Afterwards the Lessor granted the Remainder in Fee to the Lessee. It was the opinion of the whole Court that the rent was gone and extinct, because the Lessor who had the rent, is a party to the Destruction of the Lease, which is the ground of the Rent.

29. Eliz. In the King's Bench.

162 ALLEN and PATSHALL'S Case.

A Copy-holder doth surrender unto the use of a Stranger for ever; and the Lord admits the Surrendree to have and to hold to him and his Heirs. It was adjudged in this Case, That if it were upon a devise, that such a one should have the Copyhold in Fee; and afterwards a surrender is made unto the Lord to grant the Copyhold according to the Will; and he grants it in Fee to him and his Heirs, that the Grant is good. But *quare* in the first Case, for it was there but a bare Surrender only.

Mich. 27, 28. Eliz. in the King's Bench.

163 STRANGDEN and BARNELL'S Case.

AN Action of Trover and Conversion was brought of Goods in Ipswich; the Defendant pleaded, That the Goods came to his hand in Dunwich in the same County; and that the Plaintiff gave unto him the goods which came to his hands in Dunwich, *absq; hoc* that he is guilty of any Trover, and Conversion of Goods in Ipswich. And by the opinion of the Court, the same is a good manner of Pleading by reason of the speciall Justification. *Vide* 27. H. 6. But when the Justification is generall, the County is not traverfable at this day. *Vide* 19. H. 6, 6, & 7.

T

Mich.

Mich. 27. Eliz. in the Kings Bench.

164

BARTON and EDMOND's Case.

AN Infant and another were bounden in a Bond for the Debt of the Infant: The Infant at his full age did assume to save the other man harmlesse against the said Bond; afterwards the Infant died. It was resolved by the whole Court, that upon this Assumpsit an Action upon the Case would lie against the Executors of the Infant. But if a Feme Covert, and another at her request had been bounden in such a Bond, and after the death of her Husband, she had assumed to have saved the other harmlesse against such Bond, such Assumpsit should not have bound the Wife.

*Trinit. 29. Eliz. in the Common Pleas.*3 Co. 98. a. (e) 165 *ZOUCH and BAMPFORT's Case*

THIS Case was moved, When the Defendant pleads in Bar to the Action, and the Plaintiffe replies, and the Defendant doth demur specially upon the Replication, and the Bar is insufficient. Whether the Justices shall give Judgment upon the Replication, or shall resort unto the insufficient Bar, the Replication being also insufficient? And the opinion of the Court was, That when the Action is of such a nature, that the Writ and the Count doth comprehend the Title, as in a Formedon and the like, then because there is a sufficient title for the demandant by the Writ and the Count, so as the Judges may safely proceed to Judgement for the Plaintiffe, there they shall resort to the Barr. Contrary in Cases where the Title doth commence only by the Replication, as in Assize, Trespass, and the like.

40. Eliz. in the Exchequer.

166

NOte, it was said by Sir Francis Bacon the King's Solicitor, That it was adjudged 40. Eliz. in the Exchequer, That where the King had made a Lease for life, who was ousted by a Stranger, that the same should

Procter's Case. Harding's Case. 139

should be said a Disseisin of the particular estate, against the common ground, which is, That a man cannot be disseised of lesse estate then of a Fee-Simple.

40. Eliz. in the Kings Bench.

167

IT was holden and adjudged by *Popham* Chief Justice of the Kings Bench, That where a Lease was made unto the Husband and Wife for their lives, the remainder to the Heirs of the Survivor, that the same was a good remainder, notwithstanding the uncertainty, and that in that Case the Husband after the death of the Wife should have Judgement to recover the Land

33. Eliz. in the Common Pleas.

168

PROCTER'S Case.

IT was adjudged in this Case, That the Lachefs of the Clark in not entering of the Kings Silver, shall not prejudice the King or the Crowne.

30 Eliz. In the Kings Bench.

169

HARDING'S Case.

IT was holden by the whole Court of Kings Bench (as it was reported by *Sir Robert Hitcham* Knight) That if a man make a Lease of Copy-hold land, and of Free-hold land, rendering Rent; and the Copy-hold descends to one, and the Free-hold to another, that the rent shall be apportioned.

Trinit. 25. Eliz. in the Common Pleas.

Rot. 1702.

170

LEONARD and STEPHEN'S Case.

IN Trespafs, the issue joyned was, Whether it were a Feoffment or not; and upon Evidence to the Jury, the Case appeared to be, viz.

T 2

That

That there was Lessee for years, and afterwards the Lessor made a Deed of Feoffment, in which were words of Confirmation, and in the end of the Deed, there was a special Letter of Attourney to make Livery to the Lessee for years, and his heirs. And it was agreed by all the Justices, That the Lessee for years had Election to take the same by way of confirmation, or by Feoffment; and that the Law doth suspend and expect untill he hath declared his pleasure. And it was further adjudged, That when he hath made his Election, to take it by Livery, that it shall be a Feoffment, *ab initio*; and by the delivery of the Deed in the mean time, *nihil operatur*.

Mich. 31. Eliz. in the Common Pleas.

171

A Copy-holder did alledge the custome to be, That the Lord of the Manor might grant Copies in Remainder with the assent of the Tenants, and not otherwise: and that Copies in remainder otherwise granted should be meerly void. The question was, Whether it were a good custome? The Justices did not deliver any opinion in the point. But *Walmesley* Serjeant, said, That it was a void custome; for a Copyhold Estate is an estate of which the Law doth not take notice, and Copy-holders are meer Tenants at will by the common Law; and therefore to say, That he who hath not an interest should have me at his pleasure, aswell as I who am interessed should have him at my pleasure, is preposterous and repugnant to reason: as 2. *H. 4. 27.* A custome that the Commoner shall not use his Common before that the Lord hath put in his Cattel, is not good, for the Commoner hath an interest in the Common, which is not reasonable to be restrained at the pleasure of another; and 19. *Eliz. Dyer 257.* A custome that a man shall not demise or lease but for six years is a void custome. *Shuttleworth* Serjeant contrary; and he said, That the reason that this Copyhold is not within *Littlton's* Estates by Copy, is no reason; for by the same reason you may overthrow all Copyhold Estates. And he said, That this custome might have a lawfull beginning, and it seems to be grounded upon the reason of the common Law, that a remainder should not be without the assent of the particular Tenant, and therefore it is a good custome. And so is the custome, that a Woman shall not have Dower if she do not claim it within a year and a day. And a custome, that a free Tenant shall not alien without a surrender in the Court of the Lord, is a good custome. It was adjourned.

31. Eliz. in the King's Bench.

172

SIR RALPH EGERTON'S Case:

UPon a speciall Verdict the Case was this, A man being Tenant for life in the right of his Wife, he made a Deed of Feoffment *Habendum* to the Feoffee and his Heirs, *ad solum opus & usum* of the Feoffee and his Heirs for the life of the Wife; and the Court was cleer of opinion, that it was a forfeiture, because the *Habendum* is absolute; and the use is another clause; and although he doth not limit the use but for life, yet the Law limits the remainder of the use to the party who maketh the Feoffment.

Trinit. 29. Eliz. in the King's Bench.

173

MAYE'S Case.

IF a man sendeth a Letter by a Carrier to a Merchant for certain Merchandizes to send them to him by the Carrier, receiving certain monies; and the Merchant sendeth the Goods by the Carrier, without the receipt of the Money, the same shall not bind the Buyer (as it was holden by the Court) because it was but a conditionall Bargain, and it was the folly of the Merchant to trust the Carrier; and therefore in that Case the Vendee was admitted to wage his Law. And so if one writeth for Wares, and the party sends them by the same Carrier, yet if the Carrier doth not deliver them, the other may wage his Law in such Case.

Mich. 30. Eliz. in the Common Pleas.

174

HALTON'S Case:

THE case was, That a Recognizance was acknowledged before Sir *N. Read*, one of the Masters of the Chancery. The Recognizee died before the same was enrolled. And whether it might be enrolled at the Petition of the Executors of the Recognizee was the question? And
it

it was agreed by all the Justices, That the same might be enrolled; for it was like unto the Conusans of a Fine before a Judge, which might be removed out of the hands of the Judge by a *Certiorari*, and yet it is no record untill it be perfected. And at that time, it was doubted whether the Chancery might help a man who was a purchaser for valuable consideration, ~~where there wanteth~~ the word [heirs] in the Deed of purchase: But it was agreed by all the Justices, That after a Fine is levied of Land, That the Chancery may compell the Tenant to attorne.

Trinit. 31. Eliz. in the Common Pleas.

Rot. 1704.

175 *BLAGROVE and WOOD's Case.*

IN Trespass, the Question was, If a Copy-hold was surrendered, or not. And the custome was alledged to be, That a Copy-holder might surrender out of the Court to the Steward out of the Manor, And the Steward was retained onely by word, but had no Patent. *Walmesley*, He may be Steward by word well enough. But *Windham* and *Anderson* held, That he might be Steward by word onely in possession, that is, when he holds a Court in possession; But he cannot be Steward out of Court without a Patent, because he is then out of possession; And therefore, it was the opinion of the whole Court, That the surrender out of Court to the Steward by word, was not good.

Hill. 36. Eliz. in the Common Pleas.

176

THe Summons of a Copy-holder to appear at the Lords Court was at the Church; and thereupon the Copy-holder did not appear: And it was the opinion of the whole Court, that the same was no cause of forfeiture of the Copy-hold, because it was not especially shewed to be the Custome: And it shall be hard to make it a Forfeiture; for perhaps the Copy-holder had not notice of it; And to that purpose was vouched the Lord *Dacres* and *Hartstons* case. And they held, that notice ought to be given to the person; and the Refusall must be willfull; for if a Copy-holder be demanded his rent, and he saith, that he hath it not, the same is no forfeiture, but

but the deniall ought to be a wilfull deniall; and so it was said to have been adjudged in one *Winters Case*.

Trinit. 1. Jacobi in the Common Pleas.

Rot. 854.

177 *SAPLAND and RIDLER's Case.*

After long Arguments on both sides, It was adjudged by all the Justices in this case: That where the Custome of a Copy-hold Manor was to admit for life; and in remainder for life, at any time when there was but one Copy-holder for life in possession; and during the minority of the Heir within fourteen years, the Gardian in Socage in his own name did admit a Copy-holder in Remainder for life, That the same was a good admittance according to the Custome: And that he was a sufficient *Dominus pro tempore* as to this purpose. Although it was objected by *Walmesley*, That the Gardian is but *Servus*, and not *Dominus*. But because it was agreed that he had a lawfull Interest, the admittance was good, and so it was adjudged.

33. *Eliz. In the Common Pleas.*

178 *SHIPWITH and SHEFFIELD's Case.*

The Custome of a Copy-hold Manor was, That a feme Covert might give Lands to her Husband. And if it were a good Custome, or not, was the Question? *Fleetwood*. The Custom is good, and vouched 12. *E. 3.* That in *York* there is such a custome, That the Husband might give the Land of his own purchase to his wife during the Coverture; and it is a good Custome, That an Infant at the age of fifteen years may make a Feoffment, 29. *E. 3.* and the same is good at the Common Law; and yet the same all began by custome. But the Court was of opinion, That the Custome is unreasonable, because it cannot have a lawfull Commencement. And *Anderson* Chiefe Justice said, That a Custome that an Infant at the age of seven years might make a Feoffment, is no good custome; because he is not of age of discretion. And in this case at Barre, It shall be intended that the wife being *sub potestate viri*, did it by the Coherison of her Husband; The same Law is of a Custome, That the wife may lease to her

her Husband. *Fleetwood* urged, That the custome might be good, because the wife was to be examined by the Steward of the Court; as the manner is upon a Fine, to be examined by a Judge. To which the Court said nothing.

31. Eliz. in the King's Bench

179

AN Action upon the Case upon an *Assumpsit* was brought. And the Plaintiff layed his Action; That such a one did promise him, in respect of his labour in another Realme, &c. to pay him his contentment. And he said, That Twenty five Pound is his contentment, and that he had required the same of the Defendant. *Cook* moved in arrest of Judgement; it being found for the Plaintiffe, upon *Non Assumpsit* pleaded, that no place was alledged where the contentment was shewed: And the opinion of the Court was against him; for *Gawdy* and *Wray* were of opinion, that he might shew his contentment in any Action; and so it is, where it is to have so much as he can prove, he might prove it in the same Action. *Cook* said, That it had been moved in stay of Judgement in this Court upon an *Assumpsit*, because the request was not certain. And that case was agreed by the Justices, because the request is parcell of the *Assumpsit*; and the entire *Assumpsit* together in such case is the cause of the Action; but in this case, that he should content him, is not the cause of the *Assumpsit*, but only a circumstance of the matter; and it was resembled to the Case of 39. H. 6. where a Writ of Annuity was brought for Arrerages against an Abbot *pro consilio, &c.* And the Plaintiffe declared that the Council was *ad proficuum Domus*, and was not alledged in certain; and it was holden that the same was not materiall, although it were uncertain, because it was but an induction and necessary circumstance to the Action: And so the Plaintiffe recovered and had Judgement.

Mich. 29 Eliz. in the King's Bench.

180

THE Statute of 23. Eliz. cap. 25. is, *Quod non licuit alicui* to engrosse Barley, &c. and in the Statute there is a Proviso, That he may so do, so as he convert it into Malt. The question was, If in an Information upon that Statute, That the Defendant had converted it to Malt, he might plead the generall Issue, Not guilty, and give in Evidence

vidence the speciall matter, or whether he ought to plead the speciall matter. *Clench* Justice, He may plead, Not guilty, &c. for the *Proviso* is parcel, and within the body of the Statute, as 27. *H. 8. 2.* where, upon an Information upon the Statute of Farmors, it is holden by *Fitzherbert*, That the Vicar may plead, *Non habuit sententiam ad formam, contra formam Statuti, &c.* and yet the Statute in the premises of it, restrains every Spirituall Person to take in Farme any Lands, &c. and afterwards by a *Proviso* gives him liberty to take Lands for the maintenance of his house, &c. As upon the Statute of *R. 2.* If he do plead, That he did not enter *contra formam Statuti*, he may give in Evidence that he entred by Title, as that his father was seised and died: and the same is not like unto the condition of a Bond, for that is a severall thing; But the *Proviso* and the Statute is but one Act.

Mich. 29: Eliz. in the King's Bench.

181

NOte; It was said by Master *Kemp* Secondary of the King's Bench, That there is a Court within the Tower of *London*, but he said, That it was but a Court Baron; and said, That he can shew a Judgement, That no Writ of Error lieth of a Judgement given there. And it was a question, Whether Proceſs might be awarded to the Lieutenant of the Tower for Execution upon a Judgment given in the Kings Bench, because the Defendant was removed and dwelt within the Liberty of the Tower? And it was said, It could not; but the Writ ought to be awarded to the Sheriffs of *London*; and if they returne the Liberties of the Tower, then a *Non omittas* shall be awarded. But some Counsellors said, That although a *Non omittas* be awarded, yet the Sheriffs durst not go unto the Liberties of the Tower to serve the Proceſs.

2 Jacobi, in the Common Pleas.

182

The Lady STOWELL's Case.

IT was adjudged in this Case, That the wife who is divorced *causa adulterii*, shall have her Dower.

V

3. *Jacobi*

3. *Jacobi, in the Common Pleas.*

183

WARNER'S Case.

Lessor for twenty years doth surrender, rendering rent during the term. It was adjudged a good rent for so many years as the term might have continued. *quite, for the term is determined by the surrender*

3. *Jacobi, in the King's Bench.*

184

WHITLOCK and HARTWELL'S Case.

TWO Joint-Tenants for life, the one demised and granted the moiety unto his companion for certain years to begin after his death. Adjudged void, because it is but a possibility. And so is it of a Covenant to stand seised to the use, &c. as it was adjudged in *Barton and Harvey's Case*, 37. *Eliz.*

3. *Jacobi, In the Kings Bench.*

185

PINDER'S Case.

A devised lands in Fee to his son, and many other lands in tail: And afterwards he said, I will that if my son die without issue, within age, that the lands in Fee shall go to such a one. *Item*, I will that the other lands in tail shall go to others; and doth not say in the second *Item*, if the son dieth without issue, within age. It was adjudged, That the second *Item* should be without condition.

3. *Jacobi, in the Star-Chamber.*

186

RUSWELL'S Case.

A Man took away Corne in the night time to which he had a right, and was punished for a Riot in the Star-Chamber, because of his company only. *Hill.*

Hillar. 3. Jacobi.

187 KINGSTON and HILL's Case.

AN Action upon the Case was brought for saying these words, viz. Thou art an arrant Papist, and it were no matter if such were hanged; and thou, and such as thou, would pull the King out of his Seat if they durst. Adjudged that the words were not actionable: *Et quod querens nihil capiat per Billam.*

Pasch. 3. Jacobi, in the Common Pleas.

188

NOte; It was holden by the Court, That if a *Fieri facias* go to the Sheriffe to do Execution, and he levieth the money, and delivereth the same to the party; yet if it be not paid here in the Court, the party may have a new Execution; and it shall not be any Plea to say, That he hath paid the same to the party; for it is not of Record without bringing of the money in Court. *Vide 11. H. 4. 50. ar.*

Pasch. 3. Jacobi, in the Common Pleas.

189 DUKE and SMITH's Case.

NOte; That if he in the reversion suffer a recovery to divers uses, his Heirs cannot plead, That his father had nothing in the Land at the time of the recovery; for he is estopped to say, That he was not Tenant to the *Præcipe*. And it was agreed, That it was a good recovery against him by estoppel. *Quare* this case.

Mich. 3. Jacobi, in the King's Bench.

190 BIRRY's Case.

Birry was committed by the High Commissioners, and removed by *Habeas corpus* into the Kings Bench: They returned the Writ

with a Certificate, That they did commit him for certain causes Ecclesiasticall; which generall cause the Court did not allow of. They certified at another time, That it was for unreverent Carriage and sawcie Speeches to Doctor *Newman*. The Court also disallowed of that cause. *Birry* put in Bail to appear *de die in diem*, and was discharged. It was holden. That if *Birry* did not put off his Hat to him, or not give him the wall, the same were not sufficient causes for them to commit him. And it was agreed by the whole Court, That whereas the said Commissioners took Bonds of such as they cited to appear before them, to answer unto Articles, before that the party had seen the Articles, that such Bonds were void Bonds.

Mich. 3. Jacobi, in the King's Bench.

ANN Mannock was indicted in *Suffolk*, upon the Statute of 1. *El. cap. 2.* for not coming to Church twelve Sundayes together; which Indictment was removed into the Kings Bench; and Exceptions taken unto it. 1. That the Statute is, That all Inhabitants within the Realme, &c. and it is not averred *in facto*, that she did inhabit within the Realme; and the Exception was disallowed, for if it were otherwise, it ought to be shewed on the Defendants part. The second Exception, That by a *Proviso* of the Statute of 28. *Eliz. cap. 6.* it is ordained, That none shall be impeached for such offence, if he be not indicted at the next Sessions; and it appears by the Indictment, That the Offence was almost a year before the Indictment, and in the mean time many Sessions were, or *debuerrunt* to have been. And that Exception was also disallowed, for perhaps the truth is, That there was not any Sessions in the mean time, although there ought to have been. The third Exception, That the Indictment was, That she was indicted *Coram A. B. & sociis*, Justices of Peace, and it doth not name them particularly. The Exception was disallowed, for that it doth not appear that there were any other Justices there, and what was their names. And therefore it was said, That it differs from the Case of 1. *H. 7.* of a Fine levied *Coram A. B. & sociis suis*. The fourth Exception was, That the words of the Statute are, Ought to abide in the Church till the end of Common Prayer, Preaching, or other Service of God in the Disjunctive: and the Indictment was in the Conjunctive. The Exception was disallowed, for although the words are in the disjunctive, yet a man cannot depart so soon as the Service is ended if there be preaching but he ought to continue there for the whole time.

Pasch. 4. Jacobi, in the King's Bench.

AN Infant did acknowledge a Statute, and during his Nonage brought an *Andita querela*, to avoid the Statute, and had judgment. The Conusee at the full age of the Infant brought a Writ of Error and reversed the judgment given in the *Andita querela*, and the Infant the Conusor prayed a new *Andita querela*; but it was denied by the whole Court.

Mich. 4. Jacobi, in the Common Pleas.

193 PETO and CHITTIE'S Case.

IT was adjudged in the Court of Common Pleas in this Case; That concord with satisfaction is a good plea in Barre in an *Ejectione firme*.

Mich. 5. Jacobi, in the King's Bench.

194

TWO Men were bound joynly in a Bond, one as principal and the other as surety; the principal dyed Intestate, the surety took Administration of his goods; and the principal having forfeited the Bond, the surety made an agreement with the Creditor, and took upon him to discharge the Debt: In Debt brought by another Creditor, the question was upon fully administred, pleaded by the Administrator, If by shewing of the Bond, and that he had contented it with his own proper Mony, whether he might retain so much of the Intestates estate: and it was adjudged that he might not: For *Flemming* Chief Justice said, that by joyning in the Bond with the principal, it became his own Debt.

Pasch.

Pasch. 5. Jacobi, in the Common Pleas.

IN a Replevin by *John Taylor*, against *Richard James*, for taking of a Mare and a Colt in *Long Sutton*, in a place called *H.* in the County of *Somerset*; The Defendant did avow the taking, and shewed, That Sir *John Spencer* was seised of the Manor of *Long Sutton*, whereof the place where &c. is parcel, and that he and all those whose estate he hath in the said Manor &c. have had all Estrayes within in the said Manor; and shewed that the Bailiff of Sir *John Spencer* seised the said Mare and Colt as an Estray, and proclaimed them in the three next Market Towns, and afterwards the Bailiff did deliver them to the Defendant to keep in the place where &c. And if any came and challenged them, and could prove that the same did belong to him, and pay him for their meate, that he should deliver them unto him; and then shewed how that the Plaintiff came, and claimed them for his own; and because he would not prove that they did belong unto him, nor pay him for their meate &c. he would not deliver them; upon which plea there was a Demurrer in Law. After argument by the Serjeants, *Cook* Chief Justice, said, that it was a plain Case for the Plaintiff: the reason of Estrayes was, because when there is none that can make title to the thing, the Law gives it to the King, if the Owner doth not claim it within a year and a day; and also because the Cattel might not perish, which are called *Animalia vagantia* &c. But the Defendants plea is not good, because the Defendant is to keep them until proof be made unto him, and the Law doth not take notice of any proof, but by twelve Men, which the Defendant cannot take, 7. H. 2. *Bares* 241. But if the Owner can make any reasonable proof, as if he shew the Markes &c. it is sufficient, and the party *suo periculo* ought to deliver to him the Estray. Secondly, It is not sufficient to keep the Estray within the Manor, but it ought to be kept in a place parcel of the Manor. Thirdly, It ought to be in Land in the possession of Sir *John Spencer*, and not of any other; and it doth not appear that that Land was in his possession. Fourthly, If they do go in the Land of Sir *John Spencer*; Yet it is absurd to maintain that the Bailiff might delegate his power to another to keep them until he be satisfied. *Walsley* Justice, agreeeth; for when it is spoken generally of proof, it shall be taken for judicial proof, which needeth not in his Case, for these Vagrant Beasts; and the party shall not be his own Judge, but as it hath been remembered upon the Statute of Wreck, *si docere poterit*, if he can instruct him

him, and give him any reason wherefore the Estray doth appertain unto him, he ought to deliver it *in periculo*. Also it is cleer, that a agreement ought to be made with the party for the victual, and the quantity thereof shall be tryed in this Court if it come in question, as the quantity of Amends in a Replevin. *Warbanton* agreed, and said, That an Estray ought not to be wrought, but the party must agree for his meate; also the Lord cannot put the Owner to his Oath; but if the party doth tell the Marks; it is sufficient, and he ought to deliver it at his peril: and if he require more then belongs to him for the Meate, it is at his peril, for this Court shall judge of that. *Daniel* agreed, and said, That the Lord ought to proclaim them, and in his Proclamation ought to shew of what kinde the Estray is, whether Sheep, Oxe, Horse, &c. and ought to tell his name who seised them, so as the Owner might know whither he might resort for his Castel; and then it ought to be kept within the Lordship and Manor, which may extend into several Counties. *Cook* said, that the Owner ought not to be pressed to his Oath, *Pr. Cases.* 217.

Pasch. 5. Jacobi, in the Common Pleas.

196 *LANGLEY and COLSON'S Case.*

AN Action upon the Case was brought by *Langley* against *Colson*, for these words, viz. *Richard Langley* is a Bankrupt Rogue, I may well say it, for I have payed for it: and it was adjudged for the Plaintiff; for by all the Justices the first words are Actionable, although the word Bankrupt be spoken *adjectivè*, because they scandalize the Plaintiff in his Trade. At the same time another Action was brought by another Man for speaking these words, viz. Thou art a Bankruptly Knave, and canst not be trusted in London for a Groat; and it was adjudged that the words were not Actionable, because the words were spoken *adjectivè* and *adverbialiter*, and are not so much as if he had called him Bankrupt Knave, but Bankruptly, viz. like a Bankrupt.

Pasch. 5. Jacobi, in the Common Pleas.

197 *BALLET and BALLE'S Case.*

A *Warrantia Charta* was brought by *Thomas Ballet* the younger, against *Thomas Ballet* the elder; and the Writ was of two Messuages

suages and the moytie of an Acre of Land, *unde Chorum habet &c.* and declared, whereas himself and the Defendant and one Francis Ballet were seised in the new Buildings, and of one piece of Land adjoining &c. in the Tenure &c. containing from the East to the West twenty foot by assize, and from the North part to the South thirty foot, and the said Thomas the elder, and Francis did release unto him all their Right in &c. the said Thomas the elder for him and his heirs, did Warrant *tenementa prædicta* to the said Thomas the younger and his heirs: The Defendant did demand Oyer of the deed, and thereby it appeared that the said Thomas and Francis and one R. did release to him all their Right in, &c. And that Thomas the elder for him and his heirs did Warrant *tenementa prædicta* to Thomas the younger & his heirs, and that Francis by another clause for him and his heirs did Warrant *tenementa prædicta* to Thomas the younger and his heirs: upon which it was Demurred in Law, and after Argument by the Serjeants, some matters were unanimously agreed by all the Justices. First, that upon such a release with Warranty, *contra omnes gentes*, a Writ of *Warrantia Charta* lyeth. Secondly, although that every one passeth his part onely, viz. a third part, yet every one of them doth Warrant the whole: and because they may so do, and the words are general without restraint by themselves, the Law will not restrain them. The words are, that they do Warrant *tenementa prædicta*, which is, all the premises. Thirdly, For the reason aforesaid, It needs not to be shewed how they hold in jointure. Fourthly, that the Writ is well brought against one onely, because the Warranties are several; But if they had been joint Warranties, then it ought to have been brought against them both so against the Survivor & the heir of one of them; and if they had both dyed, against both their heirs; so as it differs from an Obligation personal which onely binds the Survivor. Fifthly, that the Writ was well brought for the things as they are in truth, without naming of them according to the Deed. Sixthly, that if there be new Buildings of which the Warranty is demanded which were not at the time of the Warranty made, and after the Deed is shewed, the Defendant shall not have any benefit by Demurring upon it; But if he will be aided, he ought for to shew the special matter, and enter into the Warranty for so much as was at the time of the making of the Deed; and not for the residue: *Vide Fitz. Warrantia Charta 31.* Seventhly, that a *Warrantia Charta* doth not lye of a piece of Land, no more then a *Præcipe quod reddat*, nor of a Selion of Land.

Mich. 5. Jacobi, in the Kings Bench.

198

AN ACTION upon the Case was brought for these words, *viz.* Thou halt spoken words that are treason, and I will hang thee for them. It was adjudged by the whole Court, that the words were actionable.

Mich. 5. Jacobi, in the Kings Bench.

199

A Man was bound to pay twenty pound to another, when he should be out of his Apprentiship, and he died within the time, the Executors shall not have the money; otherwise, if the Bond had been to pay money, after the expiration of ten years. Adjudged.

Mich. 5. Jacobi, in the Kings Bench.

200 GAGE and PEACOCK'S Case.

IT was adjudged in this case: That if Lessee for years of a Manor take a Lease of the Bailiwick of the Manor, that it is no surrender of his term, because it is of a thing which is collaterall.

Mich. 5. Jacobi, in the Common Pleas.

201

IF a Parson have a Benefice above the yearly value of eight pound; and afterwards he taketh another Benefice with a dispensation, and afterwards he taketh a third Benefice; his first Benefice is onely void. Adjudged *per Curiam*.

Mich. 5. Jacobi, in the Common Pleas.

202

A Man, in consideration of Marriage, doth assure and promise to do three severall things: For the not performance of one of them, the party to whom the promise is made, bringeth an Action upon the case; and to enable him to the Action, sayes, That the Defendant in consideration of Marriage, did promise him to performe the said thing, for which the Action is brought, without speaking of the other two things: The Defendant by plea in barre said, *Non assumpsit modo & forma*. And the opinion of the Court was, that it was a good issue; For the Contract being entire, if it be not a good plea, the Defendant might be charged for the severall things; which cannot be, being but one contract by word: But it is otherwise of severall contracts in writing.

Trinit. 5. Jacobi, in the Kings Bench.

203 Sir JOHN SPENCER and POYNT's Case.

Sir John Spencer made a Lease for years unto Sir John Poynts, rendering rent by Indenture: The Lessee covenants, that if the rent be behind at any time of payment according to the forme of the Indenture, that the Lessor shall have two hundred pound *Nomine pæna*, for such default. The rent is behind, Sir John Spencer brought Debt for the *Nomine pæna*. The Question was, Whether without Demand of the rent, debt did not lie for the *Nomine pæna*: And the better opinion of the Court was, that the Action of Debt did not lie. *Vide: Fitz N.B. 120.* seems contrary.

5. Jacobi, at the Sessions at Newgate.

204

IT was adjudged upon the Statute of 1 Jacobi, of desperate Stabbing to be Felony without Clergy, That because that the party had a cudgell in his hand, That that was a weapon drawn within the intent of the Statute. And the party was thereupon arraigned of Felony, and not of Murder, and admitted to his Clergy.

Mich.

Mich. 5 Jacobi, in the Kings Bench.

205

NOte, It was holden by the whole Court, That if a man appeareth upon a *Scire facias*, That he shall not have an *Audita Querela*, because he had notice *in facto*; otherwise if he had appeared upon the 2. *Nichil* returned, which amounts to a *Scire feci*, for there he hath no notice in fact; But it was said, That the course is otherwise in the Common Pleas.

Mich. 6. Jacobi, in the Kings Bench.

206

JOHNSON'S Case.

IN an Accompt, the Defendant was adjudged to account; and the parties were at issue before Auditors, and the Plaintiffe was Non-suit: The Question was, Whether he should have a *Scire facias* against the Defendant to account upon the first Originall; and the better opinion of the Court was, That he should not; but should be put to a new Writ of Account according to the opinion of *Townsend*, in 1. H. 7. against 21. E. 3. and 3. H. 4.

Mich. 6. Jacobi, in the King's Bench.

207

NOte, It was holden by Justice *Williams*, and not denied by any other of the Justices, That if Lands be given to one, and his heir, that the same is a Fee-simple, because the word (*Heir*) is *Collectivum*.

Mich. 6. Jacobi, in the Kings Bench.

208

HARLOW and WOOD'S Case.

IN an Action of Trover and Conversion, the Case was, A stranger delivered the Horse of *Harlow* to an Inholder: *Harlow* came to him,

156 *S^r Robert Barker and Finche's Case.*

him, and demanded his horse, who refused to deliver it to him if hee would not save him harmelesse and indamnified. But because the pleading was, *Quod quidem homo* did deliver to him, and did not shew his name certain; The Plea was adjudged not to be good.

Mich. 6. Jacobi, in the Kings Bench.

209 *Sir ROBERT BARKER and FINCHE's Case.*

A Man made a Lease for years rendring Rent at Michaelmas and the Annunciation of our Lady; he in the reversion bargained and sold the same to a Stranger, who gave notice thereof to the Lessee; The day of the payment came, the Lessee paid the rent to the Bargainor, and then the Deed was enrolled. The question was, Whether the Bargainee should have the rent by relation, so as the Bargainor should be charged in account to the Lessee for the rent first paid. And the Court was of opinion, That the Bargainee should not have the rent. *Dodderidge* Serjeant, If the rent be paid to an administrator who hath right for a time, and afterwards a Will is found and proved, so as it appeareth upon the matter that there was an Executor, and by consequence no administration could be; the rent shall be paid by him again to the Executors. *Quare.*

Mich. 6. Jacobi, in the Kings Bench.

210 *Grissell and Sir Christopher Hodsdens Case.*

IN this Case it was agreed for Law, That if two Lords be Tenants in Common of a Waste, and each of them hath a Court, in which are divers By-lawes made; it ought to be presented by the Homage, That such a one hath not any thing in the Common *ad exheredationem Domini*, and not *Dominorum*, notwithstanding that they are Tenants in common.

Mich.

Mich.6. Jacobi, in the Kings Bench.

211 LEE and SWAN'S Case.

AN Action upon the Case was brought for speaking of these words, viz. The Plaintiffe being a Town Clark, took forty shillings for a Bribe. And by the whole Court the words adjudged Actionable.

Mich.6. Jacobi, in the King's Bench.

212 BRIGG'S Case.

Action for the Case for words, You have bought a Roan stollen Horfe, knowing him to be stollen. It was adjudged, That the words were Actionable.

Mich.6. Jacobi, in the Kings Bench.

213

IT was adjudged in this Court, That an *Ejectione firme* doth lie *de a-*
que cursu.

Mich.6. Jacobi, in the Kings Bench.

214

A Man was indicted for a common Barrator, *Anno Regni Domini nostri Jacobi sexto* ; and the word [*Regis*] was left out of the Indictment, and for that cause the Indictment was quashed. It was *Nelson* and *Teyes* Case.

Mich. 6. Jacobi, in the Kings Bench.

215

IT was adjudged in this Court, That if the Wife of a Lessee for years doth assent a to Livery made of the house in the absence of her Husband, although that the servants and children be, and continue in the house, that it is a good Livery. *Quare*, If the wife notwithstanding her assent doth continue in the house. But if a man doth commit his house to his servants, and the one doth assent to the Livery, and departeth the house; if the other do continue there, and Livery be made, it is no good Livery of Seisin.

Mich. 6. Jacobi, in the Kings Bench.

216

IT was holden for Law in this Court, That if a man do offend against any Penal Law, the Informer ought to begin his Suit within one year after the Offence done, otherwise he shall not have the moiety of the Penalty. And if the Informer hath put in his Information, although that the party be not served with Process to answer it, yet the same doth appropriate the Penalty unto him.

Hill. 6. Jacobi, in the Common Pleas.

217

PEREPOYNT'S CASE.

Perepoynt procured one to convey the daughter of a Gentleman, and to marry her to a Ploughman in the night, and procured a Priest to marry them, and was there present, for which matter he was excommunicate by the Ordinary of the Diocels; and after absolution he was for the same committed to Prison by the High Commissioners. It was holden by the Court, That matters concerning Tithes, Marriage, or Testaments, are not examinable before them: yet because that he had suffered imprisonment for such things; and that neither the Statute of 23. H.8. nor the Cannon doth extend to the High Commissioners; it was resolved, That if upon submission to the Commissioners, they would not set him at liberty, that this Court would do it.

Mich.

Mich 6. Jacobi, in the Star-Chamber.

218

IT was resolved by the whole Court of Star-Chamber, That, if a man doth assise one who is a Plaintiffe in that Court, that it is not maintenance, because that it is for the benefit and advantage of the King: But if a man do assise an Informer in another Court, in an Information upon a Penall Law; the same is such a Maintenance for which he may be punished in this Court.

6. Jacobi in the Common Pleas.

219

IT was adjudged in this Court, That if Land which was fowed be leased to one for life; the Remainder to another for life, That if the Tenant for life dieth before the severance of the Corn, that he in the Remainder shall have the Corn.

Mich. 6. Jacobi, in the King's Bench.

220

THE Lessee of a Copy-holder was distrained for rent behind in the time of his Lessor; and the Lessee did assume and promise, That he would satisfie the Lord his rent, if he would surcease the suing of him. It was adjudged by the whole Court, That it was a good Assumpsit, and a good consideration.

Mich. 7. Jacobi, in the King's Bench.

221

PIGGOT and GODDEN'S Case.

NOte; It was in this Case agreed by the whole Court, and so adjudged, That in an *Ejectione firme* a man shall not give colour, because the Plaintiffe shall be adjudged in by title.

Mich.

Mich. 7. Jacobi, in the Kings Bench.

222

TWO Tenants in Common brought an Action upon the Case for stopping of a water course against a Stranger, whereby the profits of their Lands were lost, and it was shewed in pleading that the water had run time out of minde, & *ante diem Obstructionis*: and Judgment was given for the Plaintiffs: And two Exceptions were taken by *Coventry*. First, that Tenants in Common ought to have several Actions, and not have joyned. Secondly, that the Custom ought to have been pleaded to continue *ante & usque diem Obstructionis*, and both the Exceptions were disallowed by the Court; and it is not like the Case of *Falselys*; in which Action they must join because the same is in the Realty.

Mich. 7. Jacobi, In the King's Bench.

223

CROSSE and CASON's Case.

AN Action of Debt was brought upon due Obligation, the condition of which was, that the Obligee the 18. of August *anno 4. Jacobi*, should go from *Algate* in *London* to the Parish Church of *Stow-Market* in *Suffolk*, within 24. hours; and the Obligee shewed, that he went from *Algate* to the said place, and because he did not shew in his Declaration in what Ward *Algate* was: It was holden not to be good.

Mich. 7. Jacobi, in the Kings Bench.

224

NOTE, That it was adjudged to be Law by the whole Court, that if a man bail goods to another at such a day to rebail, and before the day the Bailees doth sell the goods in market overt: Yet at the day the Baylor may seise the goods, for that the property of the goods was alwaies in him; and not altered by the Sale in market overt.

Mich.

Mich. 7. Jacobi, in the Common Pleas.

225 *ZOUCH and MICHIL's Case.*

AN Infant Tenant in tail did suffer a Recovery by his Gardian; It was holden by the Court, that the same should binde him, because he might have remedy over against the Gardian by Action upon the Case: But otherwise if he suffer a Recovery by Attorney, for that is void, because he hath not any remedy over against him, as it was adjudged 4. *Jacobi*, in *Holland* and *Lees* Case.

Pasch. 8. Jacobi, In the Common Pleas.

226 *WILSON and WORMAL's Case.*

IN an Evidence given to a Jury, it was admitted without Contradiction, that if judgment in an action of Debt be given against Lessee for years, and afterwards the Lessee alieneth his Term, and after the year the Plaintiff sueth forth a *Scire facias*, and hath Execution; That the Terme is not lyable to the Execution, if the Assignment were made *bona fide*. Also in that *Cook* Chief Justice said, that if Lessee for years assignee over his Terme by fraud to defeat the Execution: And the Assignee assigneth the same over unto another *bona fide*, that in the hands of the second Assignee, it is not lyable to Execution: Also in this Case it was said for Law, That if a Man who hath goods but of the value of 30. pound, be endebted unto two Men, viz. to one in 20. pound, and to another in 10. pound: and the Debtor assigns to him who is in his debt 10. pound, all the goods which are worth 30. pound, to the intent that for the residue above the 10. pound debt, he shall be favourable unto him: This Assignment is altogether void, because it is fraudulent in part. But *Foster* Justice said, that it shall not be void for the whole, but onely for the surplusage, as *Twynes* Case, C. 3. part. 81. *Quere*.

Pasch. 8. Jacobi, in the Common Pleas.

227 *BRISTOW and BRISTOWE's Case.*

IN an Action of Covenant, the Case was this, Lessee for 90. years made an Assignment for part of the Term, viz. for 10. years,
Y and:

and the Assignee covenanted to repair &c. The first Lessee devised the Reversion of the Term, and dyed; the Devisee of the Reversion brought an Action of Covenant against the Assignee for 10. years; and the question was, If the Devisee of the Reversion being but a Termor, were within the Statute of 32. H. 8 of Conditions? Secondly, whether the Action would lye, because no notice was given of the grant of the Reversion. *Dodderidge* Serjeant, to the first point said, that this grant of the Reversion was not within the Statute; for the Statute is, that the grantee shall have such remedy as the said Lessors or Grantors themselves or their heirs or successors should have had, so as the Statute shall be intended of a Reversion in Fee; for the Statute doth not provide, but in case where heirs or successors shall have Action, and not in case where the Action doth belong to Executors. For the second point, he relied upon *Mallories Case*, where it is said, that the Tenant is to have notice of the Assignment of the Reversion. *Cook* Chief Justice, I hold that the Assignee of the Reversion for years in this Case shall have an Action of Covenant by the Statute: It was *Leonards Case* in the time of the Lord *Dyer*, when I was a Reporter in this Court. In *Leonards Case* Lessee for years leased over part of the Term upon condition (which is so much as a Covenant,) and afterwards granted the Reversion: and it was ruled, that the grantee might enter for the condition broken, and the reason (as I remember) was, because that Executors are named in the Statute; (but I will not charge my memory with the reason,) but I am well assured that the Case was ruled as I have said. *Dodderidge*, It is so, that within the Statute Executors are named, but not the Executors of him who hath the Reversion, but onely the Executors of the Lessee, and therefore the naming of Executors in the Statute doth not make against us. But the Lord *Cook* said, What answer you to *Leonards Case*? For the third point, *Cook* Chief Justice, and *Foster* Justice held, that there needed not any notice in this Case; because there is not any Penalty in the case, as was in *Mallories case*: For there was a condition. *Warbarron* Justice, I doubt the first point, for he who bringeth the Action upon the Statute, ought to have the whole Reversion: and so is *Winters case*, in *Dyer* 309. *Cook* and *Foster* said, It needs not that he who is to take advantage by this Statute, should have the whole Reversion; for it hath been adjudged, That if the Reversion be granted in tail, that the grantee shall take advantage of this Statute, and shall enter for the condition broken.

Pasch. 8. Iacobi, in the Common Pleas.

228 CANDICT and PLOMER'S Case.

THe Parishoners had used time out of memory of man, &c. to chuse the Parish Clark of the Church of St. *Aufins* in *Canterbury*; and the old Clark being dead; they chose a new Clark, and the Parson by force of a new Canon chose another man for the Clark: upon which, the Clark chosen by the Parishoners was sued in the Spiritual Court, and he had a Prohibition: And afterwards he was sued again in the Spiritual Court, for setting of the Bread upon the Communion Table, and for singing in another Tune then the Parishoners and the other Clark did, and was deprived by Sentence there. *Haughton* Serjeant moved for a Prohibition, and said, that although the last Suit in the Spiritual Court was not directly for the using of the Office of Clark, yet by the matters contained in the Libell, it is drawn in question, whether he were lawfull Clark or not, and therefore prayed a Prohibition. *Cook*, You shall have a Prohibition, for the Canon is against the common Law. For particular customs are part of the common Law: and said, that the Canon Law would not endure Gun-shot. And he said, that by the Suit in the Spiritual Court, they would examine whether he were a Lawfull Clark or not: For if he be a Lawfull Clark, then he hath good authority to set the Bread upon the Communion Table. *Haughton*, But what shall we do? for we are deprived by Sentence given there? *Cook*, There is no question, but that the Prohibition lyeth notwithstanding the Sentence there; and for the Deprivation, it is meerly void. For the Clarkship is a Lay Office, and may be executed by a Lay Man, and therefore the Ordinary hath no power to deprive him. But he may have an Action as Clark notwithstanding the Deprivation, for so is the Book in 8. *Aff.* 29. for an Hospital. And I wish, that an Information be drawn against them for holding plea of a thing, which is a meer Lay thing: as it was in *temps. H. 8. Br. Cases. Walmeley* Justice, The Office is Lay, and the Deprivation by the Ordinary is void; For he cannot deprive him because he hath nothing to do in the Election: and a Prohibition was granted. At another day, the Case was moved again, and the Court was of the same opinion, that the Clark could not be deprived, because the Clarkship was a Lay Office. And 3. *E. 3. tit. Annuity* 40. was cited, and 18. *E. 3.* Where a Formedon was brought of the Office of Serjeancy of the Church of *L.* But *Cook* said, the same day in another case, which was moved in Court, and gave it for a rule, that after Sentence given in the Spiritual Court,

he would not grant a prohibition, if there were not matter apparent within the proceedings; For I will not allow, that the party shall (to have a Prohibition) shew any thing not grounded on the Sentence to have a Prohibition, because he hath admitted of the Jurisdiction; and there is no reason for him to try if the spirituall Court will help him, and afterwards at the common Law to sue forth a Prohibition. All which was agreed by the whole Court.

Pasch. 8. Jacobi, in the Common Pleas.

229

A Writ of Estrepment was granted in Waste, because that for Waste done pendant the Writ, the Plaintiffe cannot recover damages. *Per totam Curiam.*

Pasch. 8. Jacobi, In the Common Pleas.

230

PITS and WARDAL's Case.

P*Its* the Butler of *Lincolnes-Inne* brought an Action of Debt against *Wardal*; and declared upon a Bond with Condition indorsed for the performance of an Arbitrement: The Defendant pleads in barre, That the Arbitrators *nullum fecerunt arbitramentum*; the Plaintiffe replied, That they did make an Arbitrement: *viz.* That the Defendant and one of the Arbitrators should enter into a Bond of eight pound to the Plaintiffe; And that after the Bond entred into, that the Plaintiffe and Defendant should release all Actions each to other, and said, That the Defendant and the Arbitrator did not enter the Bond to the Plaintiffe; The Defendant did maintain his barre; *viz. quod nullum fecerunt arbitramentum*; upon which issue was joyned, and it was found for the Plaintiffe. *Dodderidge* for stay of judgement, said, That upon the Plaintiffes own shewing, it appeareth, That the Arbitrament is void; for the Arbitrament is, that a stranger, *viz.* one of the Arbitrators, should enter Bond, and also that after the Bond entred into, That the Plaintiffe should release all actions, whereby the Bond should be released, and therefore it was void; and a void arbitrament is no arbitrament. It was admitted by the Court, that the arbitrament was void as to the Bond, to be entred into by the Arbitrator, and also that it was void as to the extinguishment of the Bond, by the release of all Actions: But the Court conceived, That the Arbitrament

bitrament did consist of two matters which were distinct, and might be severed. For although that the Arbitrament be void as to one matter, yet it shall stand good; and shall be a good Arbitrament for the other matter. And *Foster* Justice said, That in that case, the Award to make the Release might be severed; viz. That it should be good for all Actions except the Bond. *Cook* contrary, And said, That it is so entire that it cannot be divided. But the Court conceived, That the Arbitrament was good as to the Bond to be made by the Defendant, although it were void as to the Arbitrator. At another day *Dodderidge* said, That the Plaintiffe had not alledged any Breach of the Arbitrament: for he hath put it, That the Defendant and the Arbitrator had not entred into the Bond; and although they two joyntly had not entred into the Bond; yet it might be that the Defendant alone had entred into the Bond, and it needed not that the Arbitrator enter the Bond; for as to him, the Arbitrament was void. And that Exception was allowed as a good Exception by the whole Court. For they said, That the Plaintiffe ought for to shew, and alledge a breach according to the Book of *L. 5. E. 4. 108.* And they said, That although it be after verdict, yet it is not remedied by the Statute.

Pasch. 8. Jacobi, in the Common Pleas.

231

FOLIAMBES Case.

IN a Writ of Dower brought by the Lady *Foliambe*, It was agreed by the whole Court. That if the Husband maketh a Lease for years, rendring rent, and dieth; the wife shall recover her Dower, and shall have present Execution of the Land, and thereby she shall have the third part of the Reversion, and of the Rent, and execution shall not cease: And all the Justices said, That the Sheriffe should serve execution of the Land as if there were not any Lease for years, for it may be that the Lease for years is void; And although it be shewed in pleading, that there is a Lease for years, the wife cannot answer to it; and it may be there is not any Lease, and therefore the Execution shall be generall; And he who claimes the Lease for years, may re-enter into the Land, notwithstanding the Recovery and the Execution of the Dower. And if he be ousted, he shall have his Action: *Nichols* Serjeant, who was of Councell against the Demandant, said, That he would agree that the Case in *Perkins* 67. was not Law. But the Justices said, That there is a difference betwixt the Case of *Perkins*, and this Case: for in the Case in *Perkins*, the Husband had but an estate in Remainder, so as no rent or attendancy was due; so as the wife during

ring that Term could not have any benefit. Also in this case, it was agreed by the Court, That after judgement for part, the Demandant might be Non-suit for the residue, and yet have execution of that part for which he had judgment.

Pasch. 8. Jacobi, in the Common Pleas.

232

RAPLEY and CHAPLEIN's Case.

IT was ruled by the whole Court, That if a Custome be alledged, That the eldest daughter shall solely inherit, that the eldest sister shall not inherit by force of that Custome. So if the Custome be, That the eldest daughter and the eldest sister shall inherit, the eldest Aunt shall not inherit by that Custome; And so if the Custome be that the youngest son shall inherit, the youngest brother shall not inherit by the Custome. And *Foster* Justice said, That so it was adjudged in one *Denton's Case*.

Pasch. 8. Jacobi, in the Common Pleas.

233

SEAMAN's Case.

B*Arker* Serjeant prayed the opinion of the Court in this Case. Lessee for an hundred years made a Lease for forty years to *Thomas Seaman*, if he should live so long; and afterwards he leased the same to *John* his son, *Habendum* after the Term of *Thomas* for 23. years, to be accounted from the date of these presents: The Question is, If the Lease to *John* shall be said to begin presently, or after the Term of *Thomas*. And the Justices were cleer of opinion, That the Lease to *John* shall not be accounted from the time of the date, but from the end of the Term of *Thomas*, because, that when by the first words of the Limitation, it is a good Lease to begin after the Term of *Thomas*; it shall not be made void by any subsequent words. And *Cook* Chiefe Justice said, That this is no new reason, for there is the same reason given in 2. *E. 2. Grants*. And he put the Case in *Dyer* 9. *Eliz.* 261. and said, That if the Limitation be not certain when the Term shall begin, it shall be taken most beneficiall for the Lessee.

Pasch.

Pasch. 8. Jacobi, in the Common Pleas.

234 *WARD and POOL's Case.*

AN Action upon the Case was brought for speaking these words, Thou mayest well be richer then I am, for thou hast coined thirty Shillings in a day, thou art a Coiner of money, &c. I will justifie it: It was moved in arrest of Judgment, That the words were not Actionable, because he might have a good Authority to coine Money; for men who work in the Mint, are said to coine Money, and are called Coiners of Money; And so it was adjudged, *Quod Querens nihil capiat per Billam.*

Pasch. 8. Jacobi, in the Common Pleas.

235 *CHALK and PETER's Case.*

CHalk brought a *Replevin* against *Peter*; the Defendant did avow the taking as Bailiff of Sir *Francis Barrington* in sixteen Acres of wood in *Harfield Chase*; and shewed that an Arbitrament was made by the Lord *Burghley* late Lord Treasurer, betwixt the Lord *Rich* and the Ancestors of Sir *Francis*; by which it was awarded, That the said Ancestors of the said Sir *Francis Barrington* and his Heirs should have the herbage of a certain number of Acres within the said Chase; and also that he should have to him and his Heirs the Trees and Bushes of the said number of Acres within the said Chase; and that he might fell and cut sixteen Acres every year of the said Acres; and that he should enclose them according to the Laws and Statutes of the Realm; and that Assurance was made by the Lord *Rich* accordingly; and that the same was confirmed by a speciall Act of Parliament, with a saving of the right and interest of all strangers; and said, That Sir *Francis Barrington* did inclose and cut down sixteen Acres, and did enclose the same, and there took the Defendants cattel Damage feifants; upon which the Defendant did demurr in Law. The Question in the case was, If by the Statute of 22. E. 4. cap. 7. or the Statute of 35. H. 8. cap. 17. which give Authority to make inclosures of Woods, the Commoner shall be excluded. *Harris* Serjeant, I conceive, That the Commoner shall be excluded by the Statute of 22. E. 4. cap. 7. which gives Authority to inclose and exclude all Beasts, and therefore the Commoner shall be.

be excluded: But it will be objected, that the Statute is, that the Owners of the Ground may enclose: But Sir *Francis Barrington* is not Owner, for the Lord *Rich* is the Owner of the Ground; I say, that Sir *Francis Barrington* is the Owner, for he hath the Herbage and the Trees, so as he hath all the profit, and he who hath the profit shall be said to have the Land it self: and he vouched *Paramour* and *Tardleys Case in Plow. Com. & Dyer* 285. and 37. *H. 6. 35.* and 17. *E. 4. 16.* Also the Statute is in the disjunctive, viz. the Owner, or the Vendee: and although he be not Owner of the soil; yet he is Vendee of the Trees. Secondly, It will be objected, that the same is not a general Law of which the Judges are to take notice, and therefore he ought to plead it: I hold it to be general enough, of which you are to take knowledge although it be not pleaded: & he cited *Hollands Case*. Thirdly It will be objected, that by such general Law the particular interest of a private man shall not be destroyed. To that I say, that such general Statutes will include such particular interests, and therefore the Case betwixt Sir *Foulke Grevill* and *Stapleton* was adjudged, that where *Willoughby*, Lord *Brookes* had Lands to him by Act of Parliament, with authority to make Leases for one life, and no more. By the Statute of 32. *H. 8.* of Leases, that authority is enlarged, and he might make Leases for three lives. *Haughton* Serjeant, Although he be Owner of the profits, he is not Owner of the soil, and there is a difference betwixt the same and the soil. And the Statute speaks of Trees growing in his own soil. *Foster* Justice, The Arbitrament, the Assurance, and the especial Act of Parliament is nothing to the purpose in this Case, and to plead them was more then was needfull; For by the Arbitrament and the Assurance, the Commoner being a third person, cannot be bounden in which he was not a party; And by the special Act of Parliament he shall not be bound, because the Act is against the Lord *Rich*, and his Heirs, so as a stranger shall not be bound by the Act: And therefore upon the Statute of 18. *Eliz. cap. 2.* of Patents, the Case was, That the Queen made a Lease for years, which was void for not reciting of a former Lease; and afterwards she granted the Inheritance unto another. And then came the Statute of 18. *Eliz.* which confirmed all Patents against her, her Heirs and Successors; by that Statute the Grantee in Fee was not bounden, but he might avoid the Lease for years, for the Statute is against the Queen and her successors; and that case was adjudged. But our case is without doubt, as to that point, for the right and interest of strangers is saved by the Act: then all rests upon the Statute of 22. *E. 4.* and I conceive that the same is a speciall Act, and ought to be pleaded; for it is not generally of all Woods, but only of Woods in Forrests and Chases. But admitting it to be a generall Act, yet I conceive, That it was not the meaning of it to exclude a Commoner; and that appears fully by the later words of the Statute,

viz.

viz. Without licence of &c. which excludes only the Owners of the Forrest; and it was not the meaning that he might inclose without the leave of the Commoner. One thing hath troubled me in the Statute, because it is said that before that time he could not inclose more then for 3. years; so as before that statute he might enclose for 3 years, as it seems, without Licence, and now by the Statute, for 7 years. Also for another cause I conceive, that the Defendant shall not take advantage of the Statute as he hath pleaded; for he hath pleaded that he did enclose and cut, whereas the statute saies, that he shall enclose after the Cutting: so as I hold cleerely, that he hath not pursued the authority of the Stat. for upon the St. of 35. H. 8. w^{ch} is penned contrary to this Stat. *scil.* that the Owner of the wood shall make enelasure and division for the Cōmoner, and then he is to cut, I hold cleerly that after the selling he cannot make any enelasure. Also admitting that by the Stat. the Cōmoner shall be excluded, I hold that by the Stat. of 35. H. 8. that that Stat. is repealed in that point; for the Stat. of 35. H. 8. is, That no man shall fell woods wherein Commoners have Interest by Prescription until he hath divided the fourth part: so that the Authority, if any were, is restrained by that Stat. if he be a Cōmoner by Prescription, as he is in our Case. But if it had been a Common by grant, it had not been within the Clause of Restraint. And *Leges posteriores priores contrarias abrogant*, especially the Stat. being in the Negative, as it is here: For by a Negative Statute the Cōmon Law shall be restrained: otherwise, if the Stat. were in the affirmative: & for these reasons I conclude, That the plaintiff ought to have Judgment. *Warburton* Justice contrary. All the matter rests upon the Statute of 22. E. 4. First, I hold that the same is a general act, although it be particular in some things. So you may say of all statutes, which are particular in some one point or other. I hold also, That the Stat. of 22. E. 4. is not repealed in this point by the Stat. of 35. H. 8. because they were made to several purposes: The one was for Forrests and Chases, the other onely for other particular Woods: And I hold, that the Cōmoner shall be excluded; for otherwise the Stat. should be void and contrary; viz. to give power to one to enclose and exclude all beasts; and yet to permit another to put in his cattel. And by the words of the Statute, which exclude all beasts and cattell, the Deer shall not be excluded or intended, for they shall not be said beasts or cattel. As in 30. E. 3. One who chaseth a cow in a Park shall be said within the Statute *de Malefactoribus in Parcis*: And then if the authority of enelasure be not to exclude the Deer, it shall be to exclude the cattell of the Commoner, and other the like estrangers, or otherwise it should be to no purpose. As to that which hath been said, That there is not a person who may inclose by the Statute; the Statute is, that the Owner shall inclose, or he to whom the Wood shall be sold: so that although that hee be not Owner, yet he is to have the Trees and the profits; and the Statute doth intend, that he may inclose who ought to have the profit: and although the sale be not for monie,

nie, yet such a person may be said Vendee well enough; Wherefore I conclude, that Judgment ought to be for the Defendant. *Walmesley Justice*, I hold, that he hath not authoritie by the Statute to enclose: For the Statute is, When any man fells trees in his proper soile: so that he not being owner of the ground, he is not within the Statute: and that was the effect of his argument. And as to the other point, he did not speak at all. *Cook chief Justice*: I hold, that the plaintiffe ought to have judgment: all the matter doth consist upon the Statute of 22. E. 4. which is to be considered. And first is to be considered, what was the common Law before that Statute; and that was, That one who had a Wood within a Forrest, might fell it, as it appeareth by the Statute *de Forresta*: and the Statute of 1 E. 3. 2. by licence: and also he might enclose it for three yeers, as it appeareth by the Statute of 22. E. 4. but the enclosure was to be *cum parvo fossato & haia bassa*, as it appeareth by the Register in the Writ of *Ad quod damnum*: so as before that Statute, there was an enclosure. But the Law is cleer, That before that Statute, by the enclosure, the Commoner shall not be excluded. Then wee are to consider of the Statute: And first, Of the persons to whom the Statute doth extend: and that appeareth by the preamble, to be betwixt the King and other owners of Forrests and Chases, and the owners of the Soil: so as a Commoner is not any person within the meaning of the Statute. And for the body of the Statute, you ought to intend, that the sentence is continued, and not perfected untill the end of the Statute; and the words [Without licence, &c.] prove, That no persons were meant to be bounden by the statute, but the Owners of the Forrests and Chases, and not the Commoners: Like the case in *Dyer*. And although you will expound the words of the bodie of the statute generally; yet they shall be taken according to the intent of the preamble; and therefore the Case of 21. H. 7. 1. of the Prior of *Castleacre*, although it be not adjudged in the Book, yet Judgment is entred upon the Roll; which Case is *Pasch.* 18. H. 7. *Rot.* 460. By which case it appeareth, that although that a Statute be made which giveth Lands to the King; yet by that statute the Annuity of a stranger shall not be extinguished. And the Case which hath been put by Justice *Eoster* upon the Statute of 18. *Eliz.* was the case of *Boswel*, for the Parsonage of *Bridgewater*, That although that one who hath a lease for yeers of the King, which was void for misrecitall, might by the said Statute hold it against the King; yet the Patentee in Fee shall not be prejudiced by the said Statute: So I conclude, That the Commoner is not a person within this Statute of 22. E. 4. Secondly, It is to be considered, if a Wood, in which any one hath Common, be within the statute: and I hold, it is not, but onely severall Woods: For (as I have said) the Wood which before the statute might be enclosed for three yeers, was onely a severall Wood.

and

and not such a Wood in which any one had common. And the statute of 22. *E. 4.* doth extend onely to such Woods which might be felled and enclosed for three yeers: and I conceive (contrary to my Brother *Warburton*) That the Deer of the Forrest shall well enough be said to be beasts and cattell. And whereas by the common Law, before this statute, the enclosure was onely to be (as I have said) *cum parvo fossato & haia bassa*, by which the Deer were not excluded: now by this statute I hold, that they may make great hedges, to exclude aswell the Deer as other beasts. And I agree with Justice *Foster*, that if he will take advantage of the Statute, that hee ought to have pleaded, that first hee felled, and afterwards enclosed; and *e contra*, upon the Statute of 35. *H. 8.* *scil.* that hee ought first to divide, and afterwards to sell, &c. And also I agree with him, that in that point the Statute of 35. *H. 8.* being contrary, doth repeal the Statute of 22. *E. 4.* if by that Statute the Commoner shall be excluded. But I am of opinion with my Brother *Warburton* cleerly, That hee is a Vendee of the Trees, and so within the Statute: for it is not necessary, that in the Grant there be the word [Sell,] or that money by given, nor that it be a contract for a time onely, and nor to have continuance, as it is in our case. But he who hath the Trees to him and his heirs, shall be said to be a Vendee well enough. As to the other matter which hath been moved, Whether the Statute of 22. *E. 4.* be a generall law or not: I hold cleerly, that we are to take knowledg of it although it be not pleaded, because it concerneth the King; for it is made for the Kings Forrests: and of all the Acts made between the King and his subjects, wee ought to take knowledg: for so was *Stowel's Case*. And also it was adjudged, that wee ought to take knowledg of the act concerning the Creation of the Prince, because it concerneth the King. And *Cook* in his argument said, That if there had not been a speciall proviowin for the Commoner in the Statute of 35. *H. 8.* the Commoner had not been excluded by that Statute. And afterwards Judgment was entred for the plaintiffe.

Pasch. 8. Jacobi, in the Common Pleas.

236

NOte, That it was holden by three of the Justices, viz. *Walmesley*, *Warburton* and *Foster* (*Cook* and *Daniel* being absent) for law cleerly, That a Tenant at will cannot by any custome make a Lease for life by licence of the Lord: and that there cannot be any such custome for a lease for life, as there is for a lease for years.

Pasch. 8. Jacobi, In the Common Pleas.

237 BERRY'S Case.

NOte, That upon an Evidence given to a Jury, in a Case betwixt *Berry* and *New Colledg in Oxford*, it was ruled by *Walmesley, Warburton & Foster*, Justices, in an Action of Trespass, If it appear upon the Evidence that the plaintiff hath nothing in the land but in common with a stranger; yet the Jury ought to finde with the Plaintiff; and if the Defendant will have advantage of the Tenancy in common in the plaintiff, he ought to have pleaded it. *Nichols* Serjeant was very earnest to the contrary, and took a difference, where the Plaintiffe and Defendant are Tenants in common, and where the Plaintiff is tenant in common with a stranger. But he was over-ruled; the action was an action of Trespass, *Quare clausum fregit*, &c. *Cook* and *Daniel* were absent.

Pasch. 8. Jacobi, in the Common Pleas.

238

IT was holden by *Walmesley, Warburton, and Foster*, Justices, That if a Rent be granted to one and his heirs for the life of another man, and the grantee dieth; that his heir shall not be an occupant of the Rent. And *Foster* said, that the reason was, because he cannot plead a *Quere* estate of a Rent. And *Warburton* held, that the heir should have the Rent as a Freehold descended; and for that he cited 26. H. 6. *Statham Recognizance*. But *Foster* said, that he should not have the Rent at all. *Warburton* and *Walmesley* doubted whether the Rent were devisable by the Statute; and they said, that although the heir should have it by descent, yet it should not be in the nature of a descent of Inheritance; for he should not have his Age. *Cook* and *Daniel* were absent.

Pasch. 8. Jacobi, in the Common Pleas.

239 HEYDON and SMITH'S Case.

IN an Action of Trespass the Plaintiff declared of breaking of his Close, and cutting down of a Tree, viz. an Oak. The Defendant pleaded, that

that it was his Free-hold ; The plaintiff in his Replication shewed that he held of the Defendant by Copy of Court Roll a Tenement, whereof the place in question is parcell : And that the Custome of the Manor is, That all the Copy-holders within the Manor have used to take wood for house-bote, hay-bote, &c. *et pro ligno combustibili in dicto tenemento*. And said, that he had alwayes preserved the wood and trees growing upon the said Tenement ; And that he had nourished and fostered the said Oake ; And that sufficient wood was not left upon the said Tenement for house-bote &c. upon which, the Defendant did demurre in Law. *Foster* Justice, Judgment ought to bee given for the plaintiff ; I hold that a Copy-holder, of common right, without any Custome, shall have wood for Reparations and for fire-bote, and so is *9. H. 4. Fitz. Wast 59.* the opinion of *Hall* ; And I hold that the plaintiff hath an Interest in the Trees, according to *Palmer's Case. C. 5.* part. And *2. H. 4. 12.* is, That a Copy-holder may bring An Action of Trespass for the Trees. And I hold, That without a Custome, the Lord cannot sell the trees growing upon the Copy-hold no more then upon a Lease for years. But in this Case by Implication of Custome, the Lord may take the Trees, if he leave sufficient for Reparations, &c. For the Custome is, That a Copy-holder shall have sufficient for Reparations ; by which is implied, that he shall not have more, and then the Rest the Lord shall have. And I am of opinion, that in this Case, and in case where the trees are excepted upon a Lease, that the Lord and the Lessor may enter and take the Trees, although there be not any clause of ingresse, or regresse. But in the principall Case, because there are not more Trees then are sufficient for Reparation, the Lord cannot take them, but Trespasse lieth against him. *Warburton* Justice, The matter of prescription is not materiall in this case : for of common right a Copyholder ought to have Trees for Reparations ; and to that purpose, he hath a speciall propertie. But the onely question in this Case (as I conceive) is, If one who hath a speciall property, may bring an Action of Trespasse against him who hath the generall propertie ? And I conceive, that he may well enough. As if I lend my horte for a week, and within the week I take him again, Trespasse lieth. *Walmesley* Justice, For the substance, I am of opinion for the Plaintiff, but I doubt ; For I would not that Copyholders have so great libertie ; and he hath prescribed to take all trees : and to take them *ad libitum*, is too great a liberty. And I hold, that a Copyholder hath no greater property then one who ought to have Estovers : And in this case hee ought to have said, *quando opus fuerit* : and he ought to have shewed, that the houses were in decay for want of Reparations, for which cause *opus fuerat*, &c. And so for the pleading, I hold that it is not sufficient.

Cook chief Justice, The Plaintiff ought to have Judgment : For I hold.

hold cleety, That the Lord cannot take trees without leaving sufficient for Reparations, no more then he can pull down or overthrow the house of the Copyholder. For of common right, without Custome or prescription, the Trees do belong unto the Copyholder for Reparations, and for that purpose hee may take them without any Custome; and the Lord cannot take the Trees without leaving sufficient for the Copyholder, if there be not a speciall Custome so to do. But I hold, that without any custome the Lord may take the Trees, if he leave sufficient to the Copyholder for the Reparations. *Mich. 25. & 26. Eliz. Doylies Case.* A Copyholder, who hath used to take Timber for Reparations, brought an action of Trespasse. *Trinit. 26. Eliz.* An action of Trespasse was brought by a Copyholder against the Lord. *Pasch. 37. Eliz.* the Case of *Mutford Wood.* *Trinit. 40. Eliz. Stebbings Case*; but there the action was an action upon the Case. To the Exceptions taken by Justice *Walmesley*, that the Plaintiff ought to have shewed that the houses wanted Reparations; I hold, as hee said, That if the action had been brought against him, and hee justifie the cutting, hee ought to have shewed that the houses wanted Reparations. But in our Case he brings the Action against another, which lyeth, although that the houses were not then in decay. And for the signification of the word *House-boor*, &c. *Bore* is an ancient Saxon word, which signifies in some case *Recompence*, and in some case *Reparatio*. For the manner of prescription, That all the Tenants may take wood *pro ligno combustibili in dicto Tenemento*, the same is no good prescription, That all shall take to burn in that Tenement. But for the reasons before said, Judgment was given for the Plaintiffe.

Pasch. 8. Jacobi, in the Common Pleas.

240 *NEWTON and RICHARD's Case.*

IT was ruled by the whole Court in an Action of Trespasse, *Quare clausum fregit, & cuniculos suos vel ipsius A. &c. cepit, &c.* was good.

Pasch.

Pasch. 8. Jacobi, In the Common Pleas.

241 MEERES and KIDOUT's Case.

UPON an Evidence to a Jury in this Case, it was Ruled by the whole Court, That if there be Copyholder for life, and the Lord leaseth for years, and the Copy-holder commit a forfeiture, that the Lessee may enter for the forfeiture. And *Cooke* Chief Justice said, That if there be Tenant for life, the Remainder for life; If the Tenant for life committeth a forfeiture, he in the Remainder for life may enter; and that the Case 29. Aff 64. is not Law. For the particular estate in possession is determined by the forfeiture. And if hee in the Remainder could not enter, then it should be at the will of the Lessor whether hee should ever have it. The same Law is, if the Remainder be for years. *Foster* Justice, The reason that is given for an Entrie for a forfeiture, is, because that the Reversion or Remainder is devested by the Feoffment. But in this Case, because it is but *interesse termini*, nothing is devested: For notwithstanding the Feoffment, the *Interesse termini* may be granted: to which *Cook* agreed. But *Foster* said, that hee did agree in opinion with *Cook*, because that the particular estate was determined. The cause of forfeiture was, because that the Copiholder had made a lease for life.

Pasch. 8. Iacobi, in the Common Pleas.

242 Dr. NEWMAN's Case.

IN this Case it was said by *Cook* Chief Justice, That it had of late time been twice adjudged, that if Timber trees be oftentimes topped and lopped for fuell, yet the tops and lops are not Tithable; for the body of the trees being by law discharged of Tithes, so shall be the branches: and therefore he that cutteth them, may convert them to his own use, if he please.

Pasch.

Pasch. 8. Jacobi. In the Exchequer Chamber.

243 KERCHER'S Case.

AN Action upon the Case was brought in the Common Pleas, upon a simple contract made by the Testator; which afterwards came into the Exchequer Chamber before all the Judges. *Cook* in the Common Pleas was of opinion, that the Action would lie. *Tanfield* Chief Baron, said, That in these cases of Equitie it were most reason to enlarge and affirme the Authoritie of the Common law, then to a-bridge it, and the rather, because the like Case had been oftentimes adjudged in the Kings Bench, and there was no reason (as he said) that there should be a difference betwixt the Courts; and that it would be a Scandall to the Common Law, that they differed in opinion. Afterwards at another day the Case was moved in this Court; And *Walmesley* Justice doubted if as before. But *Foster* held that the Action was maintainable; And *Cooke* desired that Presidents might be searched; And he said, That he could not be perswaded, but if the Executor be adverred to have Assets in his hands sufficient to pay the specialties, but that he should answer the debt. Note, the money demanded was for a Marriage portion promised by the Testator.

Pasch. 8. Jacobi, in the Common Pleas.

244 ADAMS and WILSONS Case.

Note, It was said, That when a false Judgment passeth against the Defendant, he may pray the Court that it be entred at a day peremptory; so as he may have Attaint, or a Writ of Error. And *Cook* Chief Justice said; That if Judgment in the principall Action be reversed, the Judgment given upon the *Scire facias* shall also be reversed, because the one doth depend upon the other. *Walmesley* in this Case said, That it had been the usual course of this Court, That if one deliver a plea unto An Attorney of the Court as the Last Terme, and it is not entred, that now at another Terme the Defendant might give in a new plea if he would, because the first is not upon Record.

Pasch.

Pasch. 8. Jacobi, in the Common Pleas.

245 CULLINGWORTH'S Case.

IF one be bounden in an Obligation, That he will give to *7 s.* all the Goods which were devised to him by his father; in Debt brought upon such an Obligation, the Defendant cannot plead, that he had not any Goods devised unto him, for the Bond shall conclude him to say the contrary; *Vide 3. Eliz. Dyer 196 Rainsford Case.*

Pasch. 8. Jacobi, in the Common Pleas.

246 QUOD'S Case.

QUOD had Judgement in an Action upon the case at the Assizes, and damages were given him to Thirty Pound. *Hutton* Serjeant moved in Arrest of Judgement, That the *Venire facias* was *de duodecim*, and that one of them did not appear, so as there was one taken *de circumstantibus*; and the entry in the Roll was, That the said Jurour *exactos venit*; but the word *Juratus* was omitted: And for that cause the Judgement was stayed.

Mich. 8. Jacobi, in the Common Pleas.

247 STONE'S Case.

STONE an Attorney of the Court was in Execution in *Norfolk* for One thousand Pound, and by practice procured himself to be removed by *Habeas corpus* before *Cook* Chief Justice at the Assizes in *Lent*, and escaped to *London*; and in *Easter Terme* the Bailiffe took him again, and he brought an Action of false Imprisonment against the Bailiffe: and it was holden by the Court, That the fresh Suit had been good although he had not taken him in the end of the year, if enquiry were made after him; and so by consequence the Action was not maintainable.

Mich. 8 Jacobi, in the Star-Chamber.

248

MARRIOT'S Case.

NOte : It was agreed in this Case for Law, That the Sheriffe cannot collect Fines or issues after a generall pardon by Parliament ; and therefore one *Thorald*, the under Sheriffe of *N.* who did so, was questioned and punished in the Star-Chamber.

Mich. 8 Jacobi, in the Common Pleas.

249

JOLLY WOOLSEY'S Case.

Jolly Woolsey of Norfolk brought an Action of Trespass against a Constable, of Assault and Battery, and Imprisonment : the Defendant as to the Assault and Battery pleaded, Not guilty, and justified the imprisonment by reason of a Warrant directed unto him by a Justice of Peace for the taking, and to imprison the Plaintiff for the keeping of an Ale-house, contrary to the Statute 12 Feb. 5. *El.* whereas the Statute was 12 Feb. 5. *Ed. 6.* and the matter was found by speciall Verdict. And it was holden by all the Justices, That the misrecitall of the Act was not materiall, for it being a generall Act, the Justices ought to take knowledge of it. And Cook Chief Justice said, That a man cannot plead *Nul tiel Record* against an Act of Parliament, although that in truth the Record be imbezelled if the Act be generall, because every man is privy to it.

Mich. 8. Iacobi, In the Common Pleas.

250

NEWMAN and BABBINGTON'S Case.

IT was resolved in this Case, That if Debt be brought against an Executor, who pleads, that he hath fully administred ; and it is found that he hath Assets to 40^l. whereas the Debt is 60^l, that a Judgment shall be given for the 60^l. against the Defendant ; and upon that Judgment, if more Assets come after to the Executors hand, the Plaintiff may have a *Scire facias*.

Mich.

Mich. 8. Jacobi, in the Common Pleas.

251

WALLER'S Case.

NOte; It was said by *Cook* Chief Justice, That if the King present one to a Benefice, and afterwards presenteth another, who is admitted, instituted, and inducted, the same is a good repeal of the first presentation. And he said, That if the Lord doth present his Villain to the Church, the same is no enfranchisement of him, for that presentation is but his commendation. And if the King will present a French man, or a Spaniard, they shall not hold the Benefice within this Realm, for that the same is contrary to a special Act of Parliament.

Mich. 9. Jacobi, in the Common Pleas.

252

NOte; It was holden by all the Justices, That Perjury cannot be committed in the Court of the Lord of Copy-holds, or in any Court which is holden by Usurpation; otherwise is it in a Court Leet, or Court Baron, which is holden by Title.

Trinit. 8. Jacobi, in the Common Pleas.

253

BURY and TAYLOR'S Case.

IN an *Ejectione firme* brought upon Not guilty, pleaded by the Defendant, it was given in Evidence to the Jury to this effect; viz. That one *J. S.* who did intend to entermarry with *Alice S.* by Indenture did covenant with *J. D.* that he would marry the said *Alice*, being then of the age of seventeen years; and that after the marriage had betwixt them, that they would levy a Fine of divers Lands, which said Fine should bee unto the use of the said *J. D.* and his Heirs; and accordingly after the enter-marriage the said *J. S.* and *Alice* his Wife did levy a Fine unto the said *J. D.* and his Heirs, without any other use implied or expressed, but what was contained in the said Indenture before marriage; and according to the said Fine, the Conusee continued

tinued the possession of the said Lands for a long time: viz. for thirty years. *Cook* Chiefe Justice said, That this continuance of possession was a strong prooffe, and could not otherwise be intended, but that the Conufee came to the possession of the said Lands by the said Fine, which was so levied to him, and his heirs. And he said, That it was adjudged in this Court in the Case betwixt *Claypoole* and *Whistone*, That in a Recovery, the Covenant did not lead the use of the Recovery, for that it was but an evidence that such was the intent of the parties. And in this Case it was agreed by the whole Court, and was so said to be resolved in *Clogat* and *Blythes* case, 30. *Eliz.* That when no use is expressed or implied by Indenture, or other agreement, that it shall be to the ancient use, viz. to the use of the Conufor. As if Husband and wife be seised of one moytie of the Land in the right of the wife, and the Husband of the other moytie by himselfe; and they joyne in a Fine generally, the Conufee shall be seised to the former uses, as it is agreed in *Beckwiths* case, C. 2. part. And so it was agreed, That if the Husband doth declare the use, and the wife doth not disagree, or vary from it, that the declaration of the Husband shall bind the wife. And *Cook* said, That it is not alwayes necessary that the wives name be set to the Indenture, which doth declare an use. And further *Cook* said, That if a Fine be levied of Lands, yet the uses may be declared by subsequent Indentures. And it was said (*Obiter*) in this Case, That if a man for valuable consideration doth purchase a Lease for years; and hee nameth two of his servants as joynt-purchasers with him in the Deed; and afterwards the Master would sell the Lands alone, and the servants do interrupt the sale, or will not joyne with him; that he hath no remedy to compell them to do it, but by a Bill of Chancery.

Tritit. 8. Jacobi, in the Common Pleas.

254

A Vicar was endowed in the time of King *Henry* the 3^d. of divers Tithes; and afterwards he libelled for those Tithes in the spirituall Court; The Defendant alledged a *Modus Decimandi*, and prayed a Prohibition, and day was given to the party to shew cause, why the same should not be granted; and at the day the Deed of Endowment was produced, and shewed in Court. By which it did appear, That the Vicar was endowed of Hay. viz. of the tenth part of it; and so of the remnant of the Tithes for which he libelled; whereupon the Court refused to award a Prohibition; *Quare Causam*. For as I conceive, a *Modus Decimandi* may accrue after the Endowment.

Tritit.

Trinit. 9. Jacobi, in the Common Pleas.

255 *Sir W. DETHICK and STOKES's Case.*

S*Stokes* libelled against *Sir William Dethick* in the spirituall Court, for calling of him Bald Priest, Rascally Priest, and for striking of him; and for those offences he was fined by the spirituall Court an hundred pound, and imprisoned. And the opinion of the whole Court was, That neither the Fine nor Imprisonment were justifiable, because the Statute of *Articuli Cleri*, is, *Non imponant poenam pecuniariam, nisi propter redemptionem, &c.* And *Cook* said, They might onely excommunicate: and thereupon a Writ de *Excommunicato capiendo*, might be awarded; and that is their onely course, and then the Party may have his *Cautione admittenda*; And the Court said, That if the spirituall Court would not enlarge the party upon sufficient Caution offered them, that then the Sheriffe should deliver him.

Trinit. 8. Jacobi, in the Common Pleas.

256

IT was the opinion of the whole Court, That if a man have a Judgment against two men upon a joynt Bond; That he cannot have severall Executions; viz. a *Capias ad satisfaciendum* against the one, and an *Elegit* against the other; for he ought to have but *unicam satisfactionem*, although he sue them by severall Actions. And if he sue forth severall Executions, an *Audita Querela* will lye.

Mich. 9. Jacobi, in the Common Pleas.

257 *CARLE's Case.*

NOte, it was adjudged in this Case, That if a man say of another, that he hath killed a man, an Action upon the case will not lie for those words; for he may do it as Executioner of the Law, or *se defendendo*; So if one say of another, That he is a Cutpurse, an Action will not lie; for that a Glover doth, and a man may cut his own purse, and the same Term it was holden in the Kings Bench, That an Action will not lie for calling one Witch.

Mich.

Mich. 9. Jacobi, in the Common Pleas.

258

IT was holden by the whole Court, That a Commoner cannot generally justifie the cutting and taking away of Bushes off from the Common; but by a speciall prescription he may justifie the same. So he may say, That the Commoners have used time out of mind to dig the Land, to let out the water, that he may the better take his Common with his cattell; and it was agreed, That if the Lord of the Wasse doth surcharge the Common, that the Commoner cannot drive his cattell off the Common, or distraine them damage feafance, as he may the cattell of a stranger. But the remedy against the Lord, is either an Assize, or an Action upon the Case.

Mich. 9. Jacobi, in the Common Pleas.

259

IT was agreed by the whole Court, That if a man deviseth unto his daughter an hundred pound when she shall marry, or to his son, when he shall be of full age, and they die before the time appointed, that their Executors shall not have the money; otherwise, if the devise were to them to be paid at their full ages, and they die before that time, and make Executors; there the Executors may recover the Legacy in the spirituall Court.

Hill. 9. Jacobi, in the Kings Bench.

260

ROYLEY and DORMER'S Case.

TWO Boyes did contend and fight near unto their houses, and the one stroke the other, so as he did bleed; who went and complained to his father, who having a rod with him, came to the other boy, and beat him; upon which he died. And the opinion of the whole Court was, That it was not murder.

Mich.

Mich. 9. Jacobi, in the King's Bench.

261 EDWARDS and DENTON'S Case.

UPON a special Verdict, the Case was, that a Man was seised of the Manor of *D.* and of a house called *W.* in *D.* and also of a Lease for years in *D.* and he did bargain and sell unto another his Manor of *D.* and all other his Lands and Tenements in Dale; and in the indenture did covenant that he was seised of the premises in Fee (which was left out of the Verdict) and if the Lease for years should pass by the general words, was the question; *Quare* of the case, because *Trinit. 10. Jacobi*, the Court was divided in opinion in this Case.

Mich. 9. Jacobi, In the King's Bench.

262 HUGHES and KEENE'S Case.

THE Plaintiff declared, that whereas he was possessed of a Messuage for years which had ancient lights, and the Defendant possessed of another House adjoyning, and a Yard, that the Defendant upon the said Yard had built a House, and stopped his lights; The Defendant pleaded, that the custom of *London* was, that every man might build upon his old Foundation, and if there be not any agreement, might stop up the Windows of his Neighbour; upon which the Plaintiff did demurre in Law: and it was adjudged for the Plaintiff, because that the Defendant did not answer the Plaintiffs charge, that he had built upon the new, and not upon the old Foundation. And it was holden by the whole Court in this Case, that a man may build upon an old Foundation by such a custom, and stop up the lights of his Neighbour, which are adjoyning unto him, and if he make new Windows higher; the other may build up his house higher to destroy those new Windows: But a man cannot build a House upon a place where there was none before, as in a Yard, and so stop his Neighbours lights: And so it was adjudged in the time of Queen *Elizabeth*, in *Althans* Case, upon such a custom in the City of *York*. And it was said by *Cook* Chief Justice; That one prescription may be pleaded against another, where the one may stand with the other, as it was adjudged in *Wright* and *Wrights* Case. That a Copy-holder of a Bishop did prescribe, that all Copy-holders,

holders within the Manor have been discharged of Tithes : But not where one prescription is contrary to the other ; whereas one prescribes to have lights, and the other prescribes to stop the same lights.
Quare.

Hill. 9. Jacobi, in the King's Bench.

263

SAMFORD and HAVEL's Case.

IN an Action of Trespafs for 30. Hares, and 300. Coneys hunted in his Warren, taken and carried away, which Trespafs was layd with a *continuando*, from such a time, till such a time : the Defendant justified, because he had common in the place where, &c. to a Messuage, six Yard Lands for 240. Sheep, and that he and all those whose estate he hath, time out of mind, have used at such time as the Common was surcharged with Coneys, to hunt them, kill and carry them, as to his Messuage appertaining : upon which the Plaintiff did demurre in Law, because a man cannot make such a prescription in the Free-Warren, and Free-hold of another Man : And secondly, because a man cannot so prescribe to hunt, kill, and carry away his Coneys, as pertaining to his Messuage : But a Man may prescribe to have so many Coneys to spend in his House : and for these causes in the principal case, the prescription was holden for a void prescription ; and Judgment was given for the Plaintiff.

Hill. 9. Jacobi, in the Common Pleas.

264

COX and GRAY's Case.

IT was adjudged upon a Writ of Error, brought upon a Judgment given in the Marshalsey, in an Action of trover and conversion of goods : That if none of the parties be of the Kings household, and judgment be given there that the same is Error, and for that cause the Judgment was reversed.

Hill.

Hill. 9. Jacobi, in the Common Pleas.

265 MORRIS'S Case.

IN an Action upon the case for putting of cattel upon the common, it was adjudged; that if the cattel of a Stranger escape into the common, the Commoner may distrain them damage feasant, as well as where the cattel are put into the common by the stranger.

Pasch. 10. Jacobi, in the Common Pleas.

266 *The Lord MOUNTEAGLE and
PENRUDDOCK'S Case.*

IT was holden by the whole Court in this case, and agreed by all the Serjeants at the Barre, That if two men submit themselves to the arbitrament of *I. S.* And the Arbitrator doth award, that one of them shall pay ten pound, and that the other shall make a release unto him, that the same is a void Award, if the submission be not by Deed; and hee to whom the Release is to be made by the Award, may have remedy for it; for otherwise the one should have the ten pound, and the other without remedy for the Release. And it was resolved, That upon submission and arbitrament, that the party may have an Action upon the Case for not making of the Release. And *Cook* chief Justice said, That it was wisely done by *Manwood* chiefe Baron, when he made such award, That a Lease or such like Collaterall thing should be done, to make his Award, that he should make the Release, or pay such a sum of money, for which the party might have a remedy. I conceive, that the reason is, That no Action upon the case upon an Arbitrament lieth; because it is in the Nature of a Judgement. At another day, the opinion of the Court was with *Cook*, and 20. *H. 6.* and 8. *E. 4.* 5. cited to the purpose, that there ought to be reciprocal remedy. It was also said in this Case, That by the Statute of 5. *H. 5.* A man cannot be Nonfuit after Verdict.

Pasch. 10. Jacobi, In the Common Pleas.

267 COOK and FISHER's Case.

IN a Replevin, the Defendant did avow for rent granted to him by a private Act of Parliament. The Plaintiffe did demand *Oyer* of the Act; and the opinion of the Court was, that he ought to have *Oyer*: for they held, that the *Oyer* of no Record shall be denied to any person, in case he will demurre. And the Record of the Act shall be entred in *hec verba*.

Pasch. 10. Jacobi, in the Common Pleas.

268 The Bakers Case of Gray's-Inne against Occould.

AN Action of Debt was brought in London against Occould late Steward of Gray's-Inne: upon a generall *indebitatus assumpsit*, without shewing the particulars, which plea was removed into the Common Pleas. And it was holden by the Court, That the Action as it was brought, would not lie, for the inconvenience which might follow. For the Defendant should be driven to be ready to give an answer to the Plaintiffe to the generality. And therefore the Plaintiffe ought to bring a speciall Action for the particular things; The like Case was in the *Marshalsey*; and because they did not declare in a speciall manner, Exception was taken to it, and adjudged, the Action upon a generall *Indebitatus assumpsit* did not lie. *Quare.*

Trinit. 10. Jacobi, in the Common Pleas.

269 READ and HAWE's Case.

IN a Replevin, *Trinit. 10. Jacobi, Rct. 2504.* The Plaintiff counted, that the Defendant, *Cepis ovina* of the Plaintiff *apud Occould*: and doth not say, *In quodam loco, &c.* upon which the Defendant did demurre in Law. *Hutton* Serjeant argued for the Plaintiffe, and said, That notwithstanding the many presidents which had been shewed, that yet the Declaration was well enough: For he said, That the presidents did not prove,

prove, that it was necessary that it should be therein shewed, in *quodam loco vocat*, because the Defendant upon the matter is the Actor; and therefore he best knows the place where he took the Cattel. And in 9. E. 4. In a *Homine replegiando*, the Towne onely was named; and it is not there debated whether the same were good without mentioning in *quodam loco*. 49. E. 3. 14. and 24. 9. H. 6. and 3. H. 6. There the traverse was of the taking at *Dale, sans ceo*; &c. that the same was at Sale, and in *quodam loco* is not expressed. Cook Chief Justice said, That there is no book which taketh this Exception: and said, That notwithstanding the Presidents cited, that it was well enough: For hee said, There is a difference betwixt Presidents, which are the Inventions of Clerks, and of judiciall Presidents: And the effect of the Suit in this case, is, not the shewing of the place, but the having of the Cattel; and it is on the part of the Defendant to shew where hee took the Cattel, for perhaps the Plaintiffe doth not know where he took them: and if he did know the place where they were taken, yet perhaps hee hath not witnesses to prove the same; and so by this means the Plaintiffe should be at a great mischief, and delayed in his Suit. Whereas a Replevin is *festinum remedium*, to have his Cattel again, which perhaps are his plough Cattel. Warburton Justice said, That there is a difference betwixt Actions brought in the King's Bench, and in this Court: For there in an Action of Trespasse the same may be abutted, because it is no Originall Writ as it is here, and hee said, That there although the place bee not certainly abutted, yet it may be good. And he compared the Case at barre, to the pleading of a Joynt-tenancy; for he said, In case it bee pleaded of the part of the Tenant himselfe, hee is to shew how the Joynt-tenancy came, because it lyeth in his knowledge; but contrary, if it were on the Plaintiffs part. And in this Case, he who best knowes when the taking was, ought to shew it, and that is the Avowant; for it is no reason that the Plaintiffe for missing of the place, not being the substance, should be tried. Cook, If one in the night drive my Cattel into his Land, and afterwards doth distress them, it is no lawfull distress. At another day, Cook said, That in the Book *Nov. Narration*, it is said, That the Town, place, and collour of the beasts ought to bee shewed by the Plaintiffe in the Replevin; and he said, If the Colour had been left out, he would have given credit to the Book; but because it is clear that the Colour is not needfull to be shewed, therefore he did not approve of the Authority for the place. And he cited 4. E. 3. 13. where the Defendant said, it was in the Hamlet. And 18. E. 3. 10. E. 3. and 49 E. 3. 14. where the Towns only are mentioned. And it was said, That in an *Ejection firme* brought in the Kings's Bench, the usuall course is to abut

the Land, yet he said, It might be omitted in Trespasse, although the same be the usuall forme of that Court; and it may be generall: but if a place be alledged, then the same is materiall, and the Plaintiffe doth thereby give an advantage unto his Adversary.

At another day *Haughton* Serjeant argued for the Defendant, That the expressing of the place where the taking was, is materiall in the Declaration; and he said, That as the Register is the rule for Originall Writs, from which forme a man may not vary; so, he said; The Book of Entries and Presidents of the Courts, were rules for pleadings, from which there ought to be no variance; and therefore he cited 33. H. 6. 14. Where in a Writ of Entry, in the nature of an Assize, the Demandant counted, How that *A.* gave Lands unto *J. S.* his Cosen, whose Heir he is in tail, and shewed the descens. And Exception was taken unto the Count, because it was not the forme of the Pleading in that Court; wherefore it was awarded, That he should count, that *ipse fuit seiscitus ut de libero tenemento*, which is not repugnant, although that he had an Estate in tail, because the same was the Ancient form used in the Court. So he said in the principall Case, the ancient used forme of the Court ought to be observed, which was to expresse in the Count the place in which the taking was; and hee cited 35. H. 6. 40. Where Exception was taken by the Defendant, because the Plaintiff in the *Replevin* did not alledge the place where the taking was; and therefore *per curiam* the Plaintiffe took nothing by his Writ: and he denied the opinion of 9. E. 4. 41. and said, That in reason the place ought to be shewed, because if the Defendant would plead any matter to the Jurisdiction of the Court, the place must be shewed; and he said, That those Records which were shewed on the other side were but of later times; and the Point in question, in none of those Cases came in debate judicially, wherefore he concluded for the Defendant. *Hutton* Serjeant argued again, and said, That the Formes of Originall Writs are certain, from which a man is not to vary; but he said, That Counts and Declarations are to be according to the matter. And in the principall Case he conceived, That it was not necessary that the place where the taking was, be shewed; and hee cited 4. Ed. 3. 13. in a *Replevin*, the Plaintiff declared of the taking of his Cattel in *Holme*, without saying, *In quodam loco vocat'*, &c. and it was holden good, because the Towne or Hamlet is sufficient, certain; and 21. H. 7. 22. a. in a *Replevin*, the Plaintiffe declared of a taking at *D.* the Defendant said, That he took them at *S.* and not at *D.* and avowed; and no Exception was taken thereunto for want of expressing the place.

place in *quo*, &c. And he said, That in 9. Ed. 4. 41. and 25. it is said, That in a Replevin the use is to declare in a certain place; but if the place be omitted, yet it is good enough; and that Book is after 33. H. 6. 40. and hee said, That the cause of the Judgement in 33. H. 6. might be, because there were Blanks left for the place; and the Plaintiff had begun to alledge the certain place; for the Record is, *In quodam loco vocat*, without expressing the place, but Blank, which he could not affirme; and therefore it was adjudged against the Plaintiffe; as in a *Valore Maritagii*; if the Defendant will shew that hee tendered a marriage, whereas it is not needfull for him so to do, yet if the same be not true, and issue be taken upon it, Judgement shall be given against him; wherefore hee concluded for the Plaintiffe. The principall Case was adjourned.

Trinit. 10 Jacobi, in the Common Pleas.

270 GOODMAN and GORE's Case.

Goodman brought an Assize against Gore and others, for erecting of two houses at the West end of his Wind-Mil, *per quod ventus impeditur*, &c. And it was given in Evidence, That the said houses were situate about eighty feet from the said Mill; and that in height it did extend above the top of the Mill, and in length it was twelve yards from the Mill; and notwithstanding this neernesse, the Court directed the Jury to find for the Defendant. And in that Evidence it appeared by a Deed, procured by the Plaintiff himself, That his Wife was Joint-tenant with him; and therefore it was holden by the Court, That the Assize brought in his own name alone, was not well brought. And Cook Chief Justice also said, That the Count was not good, by reason of these words, viz. *Per quod ventus impeditur*; for he said, That these were the words of an Action upon the Case, and not of an Assize. But the Clarks said, That such was the usuall forme, *ad quod non fuit responsum*: and in that Case it was said *obiter* by Cook Chief Justice, That if the Husband and Wife be Joint-tenants, and the Husband sows the Land and dieth, and the Wife doth survive, that she shall have the emblements.

Trinit.

Trinit. 10. Jacobi, in the Common Pleas.

271 HARDINGHAM'S Case.

IN an Action of Trespass, *Quare clausum fregit*, the Defendant did justify, That he did enter and distrain for an Amercement in the Sheriffs Torne, which was imposed upon the Plaintiffe for encroaching upon the Kings High-way, without shewing that the same was presented before the Justices of Peace at their Sessions, as the Statute of 1. E. 4. cap. 2. requireth. *Houghton* Serjeant for stay of Judgement in this Case, said, That the Statute is, That the Justices of Peace shall award Process against the person who is so indicted before the Sheriffe, which was not done in this Case. And he said, That the Statute did not extend to Amercements only in Trespasses, *Quare vi & armis*, but to every other Trespass; for the Statute speaks of Trespasses, and other things, which shall be extended to all Trespasses. *Cook* Chief Justice said, That the Statute of 1. E. 4. cap. 2. did not extend to Trespasses which were not *contra pacem* (as the encroachment in this Case is) for otherwise the Lord of a Leet could not distrain for an amercement without such presentment before Justices of the Peace. And although the Statute speaks of Felony, Trespass, &c. the same is to be meant of other things of the same nature; which is proved by the clause in the Statute, viz. That they shall be imprisoned; which cannot be in the principall Case at Bar. *Warburton* and *Winch* Justices, agreed in opinion with *Cook* Chief Justice.

Trinit. 10. Jacobi, in the Common Pleas.

272 FRAUNCES and POWELL'S Case.

IT was moved for a Prohibition to the Spirituall Court, for citing the Plaintiffe out of his Diocess upon the Statute of 23. H. 8. and by the Libel it appeared, That *Powell* the Defendant had complained against the Plaintiffe in the Court of Arches, for scandalous words spoken in the Parish of Saint Sepulchers, London. *Cook* Chief Justice held, That a Prohibition would lie, unlesse the Bishop of London had given liberty to the Arch-Bishop of Canterbury to entermeddle with matters within London; for, he said, that in the Statute of 23. H. 8. there is a clause of exception in case where such liberty is given by the inferior Dioc-

Diocesan; and therefore a day was given by the Court to procure a certificate of the opinion of the Civilians, whether such authority given by the Inferiour Ordinary to the Arch-Bishop, were Warranted by there Law or not; for the Statute of 23. H. 8. is so; and then if the authority be lawfully granted, no prohibition will lye. And Cook said; that the Statute of 23. H. 8. was made but in affirmance of the common Law, as appears by the books of 8. H. 6. and 2. H. 4. For there it is said, that if one be excomenige in a forrain Dioces, that the same is void, & *coram non iudice*; and he said, that the principal cause of making of the said Statute, was to maintain the Jurisdiction of Inferiour Dioceffes. But it was holden, that if the Plaintiff had defamed the Defendant within the Peculiar of the Arch-Bishop, that in such case he might be punished there, although that he did inhabit within any remote place out of the Peculiar of the Arch-Bishop: and in this Case it was said, that the Arch-Bishop had in thirteen Parishes in London Peculiar Jurisdiction. It was adjorned.

Trinit. 10. Jacobi, in the Court of Wards.

273 COTTONS Case.

SIR John Tirrel Tenant in Capite, made a Lease unto Carrel for 1000. years; and further covenanted with Carrel and his Heirs, that upon payment of five Shillings, that he and his heirs would stand seised of the same Lands unto the use of Carrel, and his Heirs: And in the Deed there were all the ordinary clauses of a conveyance *bona fide*; viz. That the Lessee should enjoy the Lands discharged of all Incumbrances, and that he would make further assurance, &c. Carrel assigned this Lease to Cotton, who died in possession, his Heir within age; and in two Offices, the Jury would not find a Tenure, because it was but a Lease for years. And in a *que plura*, the matter came in question in the Court of Wards: And Cook Chief Justice of the Common Pleas, and Tanfield Chief Baron of the Exchequer, were called for Assistants to the Court of Wards, and they were of opinion, that because it was found by the Offices, that Cotton died in possession, that the same was sufficient to entitle the King to Wardship of the Lands. But before the Judges delivered there opinions, the Lessee was compelled to prove the Sealing of the Lease by witnesses, which was dated 12. years before: For if they have not sufficient witnesses to prove the Sealing of the Lease, without all doubt, there was sufficient matter found to entitle the King, viz. that the party died in possession; which shall be intended of an estate in Fee simple, till the contrarie be proved;

proved; But the two Justices moved the Attorney, That he would not trouble himself with the proof of a matter in fact: For they said, It was confessed on all sides, that there was such a Lease, and that the Assignee of it died in possession of the Land: and therefore they said, that they were cleer of opinion, that the Heir of such a Lessee who died in possession should be in Ward: For *Cook* Chief Justice said, that all Offices which are found to deceive the Crown of such an ancient flower of the Crown as Wardship, should be void, as to that purpose, and most beneficial for the King. And he cited the Case in 36. H. 8. Where the Kings Tenant made a Feoffment, and took back an estate unto himself for life, the Remainder to his Grand-child for 80. years, and died; that in that Case the Heir was in Ward: and they said, that in the case at Barre the Heir had power of the Inheritance upon payment of five Shillings; and if the Lease for years be found, and proved by witnesses, yet it carrieth with it the badges of fraud. And *Tanfeild* Chief Baron said, that if a Lease for 100. years shall be accounted Mortmain, *a fortiori* this Lease for 1000. years, shall be taken to be made by fraud and collusion: And *Cook* said, that the Lord Chancellour of England would not relieve such a Lessee in Court of Equity, because the beginning and ground of it is apparant fraud. Note, the lands did lye in *Springfield* in *Essex*.

Trinit. 10. Jacobi, in the Common Pleas.

274

M E A D E S Case.

AN Action of Debt was brought upon a Bond against *Meade*, who pleaded, that the Bond was upon condition, that if he paid ten pound to him whom the Obligee should name by his last will, that then &c. and said, that the Obligee made his Will, and made Executors thereof, but did not thereby name any person certain to take the ten pound. *Sherley* Serjeant moved, that the Executors should have the ten pound, because they are Assignees in Law, as it is holden in 27. H. 8. 2. But the whole Court was of opinion, that the Executors were not named in the Will for such a purpose. viz. to take the ten pound; For they said, It is requisite that there be an expresse naming who shall take the ten pound, otherwise the Bond is saved, and not forfeited. And *Cook* put this Case, If I be bounden to pay ten pound to the Assignee of the Obligee, and his Assignee makes an Executor, and dieth, the Executor shall not have the ten pound. But if I be bounden to pay ten pound to the Obligee, or his Assignee, there the Executor shall have it, because it was a duty in the Obligee himself; the same Law, if I be bound to enfeoffe

enfeoffe your Assignees, &c. Wherefore it it was adjudged for the Defendant.

Trinit. 10. Jacobi, in the Common Pleas.

275 GREENWAY and BAKER's Case.

IT was moved, and afterwards resolved in the Case of a Prohibition, prayed to the Court of Admiralty, That if a Pirat taketh goods upon the Sea, and selleth them; that the property of them is changed no more, then if a theife upon the Land steales them, and selleth them. And in this Case it appeared by the Libell, That *bona piratica fuerint infra Portam Argier super altum mare*. And for that cause a Prohibition was denied, because *Argier* being a forrain Port, the Court could not take notice whether there were such a place of the Sea called the Port, or whether it were within the Land, or not: Afterwards upon the mediation of the Justices, the parties agreed to try the cause in the *Guild-hall* in *London*, before the Lord Chiefe Justice *Cook*.

Trinit 10. Jacobi, in the Common Pleas.

276. Sir FRANCIS FORTESCUE,
and COAKE's Case.

UPON an Evidence in an *Ejectione firme* betwixt the Plaintiffe and Defendant, The Court would not suffer Depositions of witnesses taken in the Court of Chancery, or Exchequer, to be given in Evidence, unlesse *affidavis* be made, that the witnesses who depofed were dead. And *Cook* Chiefe Justice said (*nullo contradicente*) That it is a principall Challenge to a Jurour, That he was an Arbitrator before in the same case, because it is intended, that he will incline to that partie to which he inclined before: but contrary is it of a Commissioner, because he is elected indifferent. And it was also said in this Case, That one who had been Solicitor in the Cause, is not a fit person to be a Commissioner in the same Cause.

Trit. 10. Jacobi, in the Common Pleas.

277

Barker Serjeant, in Arrest of Judgement, moved, That the *Venire facias* did vary from the Roll in the Plaintiffs name; for the Roll was *Petr Percy*, and the *Venire facias*, *John Percy*, and the *poslea* was according to the Roll, which was his true name. The Court doubted whether it might be amended, or whether it should be accounted as if no *Venire facias* had issued, because it is betwixt other parties. But it was holden, That in case no *Venire facias* issueth, the same is holpen by the Statute of *Jeofailes*, and in this case it is in effect as if no *Venire facias* had issued forth; and so it was adjudged. And Cook Chiefe Justice said, that if there be no *Venire facias*, nor *habeas Corpora*, yet if the Sheriffe do return a Jury, the same is helped by the Statute of *Jeofailes*. Warburton Justice contrary, vide C. 5. part Bishops case. And Harris Serjeant vouched *Trit. 7. Jacobi*, Ros. 787. in the Exchequer, *Herenden* and *Taylors* case to be adjudged as this Case is.

Trit. 10. Jacobi, in the Common Pleas.

278

BROWN'S Case.

IT was holden by the whole Court in this case, That if a man hath a *Modus Decimandi* for Hay in Black-acre; and he soweth the said acre seven years together with corn, that the same doth not destroy the *Modus Decimandi*, but the same shall continue when it is again made into hay. And when it is sowed with corn, the Parson shall have tithe in kind; and when the same is hay, the Vicar shall have the tithe hay, if he be endowed of hay.

Trit. 10. Jacobi, in the Common Pleas.

279

JAMES and RATCLIFF'S Case.

IN Debt upon a Bond to perform such an agreement, The Defendant pleaded *Quod nulla fuit conclusio sive agreementum*: The Plaintiff said, *Quod fuit talis conclusio & agreementum. & de hoc ponit se super patriam*. The Court held the same was no good issue, because a Negative and an Affirmative.

Trit.

Trinit. 10. Jacobi, in the Common Pleas.

280 WETHERELL and GREEN's Case.

IT was said by the Pronothories, That if a *Nihil dicit* be entred in Trinity Term, and a Writ of Enquiry of Damages issueth the same Term, that there needs not any continuance; but if it be in another Term, it is otherwise. The Court said, If it were not the course of the Court, they would not allow of it; but they would not alter the course of the Court: the words of continuance were, *Quia vicecomes non misit brev.*

Trinit. 10. Jacobi, in the Common Pleas.

281 PARROT and KEBLE's Case.

A Man levied a Fine unto the use of himself for life, the remainder in tail, &c. with power reserved to the Conusor to make Leases for eighty years in Possession or Reversion, if *A.B.* and *C.* did so long live, reserving the ancient rent; afterwards he granted the Reversion for eighty years, reserving the ancient rent: The question was, Whether he had pursued his Authority, because by the meaning of the Proviso a Power was, That the Conusor should have the rent presently, or when the Term did begin. But the opinion of the Court was, That he had done lesse then by the Proviso he might have done, for this Grant of the Reversion doth expire with the particular estates for life. But if he had made a Lease to begin after the death of the Tenants for life, the same had been more then this grant of the Reversion. And *Cook* chief Justice said, That the Grantor may presently have an Action of debt against the Grantee of the Reversion for the rent. But because it was not averred that any of the *Cestuy que vici* were alive at the time when the Grantor did distrain for the rent, Judgment in the principall case was respited.

Trinit. 10. Jacobi, in the Common Pleas.

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UPon the Statute of Bankrupts, this Case was moved to the Court, If a Bankrupt be endebted unto one in Twenty Pounds, and

and to another in Ten Pounds ; and he hath a Debt due to him by Bond of Twenty Pounds ; Whether the Commissioners may assigne this Bond to the two Creditors jointly ; or whether they must divide it, and assigne Twenty Marks to the one, and Twenty Marks to the other. And the Court was of opinion, That it was so to be divided as the words of the Statute are, viz. to every Creditor a portion, rate and rate like, &c. And then it was moved, How they might sue the Bond, whether they might joine in the Suit or not? *ad quod non fuit responsum* by Cook. Warburton Justice said, That when part of the Bond is assigned to one, and part to another, that now the Act of Parliament doth operate upon it, and therefore they shall sue severally ; for he said, That by the custome of London, part of a debt might be attached : And therefore he conceived part might be sued for.

Trinit. 10. Jacobi, In the Common Pleas.

Sprat Sub-Deacon of Exeter, did libel in the Spiritual Court against Nicholson Parson of A. *pro annuall pensione*, of Thirty Pound, issuing out of the Parsonage of A. and in his Libel shewed, How that *tam per realem compositionem, quam per antiquam & laudabilem consuetudinem, ipse & predecessores sui habuerunt & habere consueverunt prædictam annualem pensionem* out of his Parsonage of A. Doddridge Serjeant moved for a Prohibition in this Case, because he demands the said Pension upon Temporall grounds ; viz. prescription and reall composition. But Cook Chief Justice, and the other Justices were of opinion, That in this Case no Prohibition should be granted ; for they said, That the party had Election to sue for the same in the Spirituall Court, or at the common Law, because both the parties were Spirituall persons ; but if the Parson had been made a party to the Suit, then a Prohibition should have been granted ; *Vide Fitz. Nat. Brev. 51. b. act.* And they further said, That if the party sueth once at the common Law for the said Pension ; that if he afterwards sue in the Spirituall Court for the same, that a Prohibition will lie, because by the first Suit he hath determined his Election. And Cook cited 22. E. 4. 24. where the Parson brought an Action of Trespas against the Vicar for taking of Under-Woods, and each of them claimed the Tithes of the Under-Woods by prescription to belong unto him ; and in that Case, because the right of the Tithes came in question, and the persons were both of them Spirituall persons,

S^tBapt. Hix, and Fleetw. & Gots Case. 197

sons, and capable to sue in the Spirituall Court; the Temporal Court was ousted of Jurisdiction. But he said, That if an issue be joined, whether a Chappel be Donative or Presentative, the same shall be tryed by a Jury at the common Law. And in this case it was said by the Justices, That the Statute of 34. H. 8. doth authorize Spiritual persons to sue Lay-men for Pensions in the Spiritual Courts; but yet they said, That it was resolved by all the Judges in Sir *Anthony Rogers* case, That such Spiritual persons could not sue before the High Commissioners for such Pensions; for that Suits there must be for enormous Offences only: And in the principall case the Prohibition was denied.

Trinit. 10. Jacobi, in the Common Pleas.

284 Sir BAPTIST HIX, and FLEETWOOD and GOT's Case.

Fleetwood and Gots by Deed indented, did bargain and sell *Weston Park*, being three hundred Acres of Lands, unto Sir *Baptist Hix*, at Eleven Pound for every Acre, which did amount in the whole to Two thousand five hundred and thirty Pounds: and in the beginning of the Indenture of Bargain and Sale, it was agreed betwixt the parties, That the said Park, being much of it Wood-land, should be measured by a Pole of eighteen foot and a halfe. And further it was covenanted, That *Fleetwood* and *Gots* should appoint one Measurer, and Sir *Baptist Hix* another, who should measure the said Park; and if upon the measuring it did exceed the number of Acres mentioned in the Indenture of Sale; that then S. *Baptist Hix* should pay to them according to the proportion of 11 ^l. for every Acre; and if it wanted of the Acres in the deed, that then *Fleet* and *Gots* should pay back to S. *Baptist* the surpluse of the mony according to the proportion of 11 ^l. for every Acre. And upon this Indenture Sir *Baptist Hix* brought an Action of Covenant against *Fleetwood* and *Gots*, and assigned a Breach, that upon the measuring of it, it wanted of the Acres mentioned in the Deed 70 Acres: And upon the Declaration, the Defendants did demurre in Law; and the cause of the Demurrer was, because the Plaintiff did not shew by what measure it was measured. And therefore *Sherley* Serjeant, who was of Councel with the Defendants, said, that although it was agreed in the beginning of the Deed, that the measure should be made by a Pole of 18 feet and a half: Yet when they come to the covenants, there it is not spoken of any measure at all; and therefore (he said) it shall be taken to be such

198 *Sir Henry Lea and Henry Leas Case.*

a measure which the Statute concerning the measuring of Lands speaks of, viz. a measure of sixteen foot and a half to the Pole; and he said, that by such measure there did not want any of the said three hundred Acres mentioned in the Deed. *Dodderidge* Serjeant contrary for the Plaintiff, and he layed this for a ground: That if a certainty doth once appeare in a Deed, & afterwards in the same Deed it is spoken indefinitely, the same shall be referred to the first certainty, and to that purpose he vouched the case in *Dyer*: Lands were given by a Deed to a man, & *hereditibus masculis*; and afterwards in the same Indenture it appeared, that it was *hereditibus masculis de Corpore*, and therefore it was holden but an estate in tail, because the first words were indefinite, and the later words were certain, by which his intent did appeare to pass but an estate in tail. He also cited 4. E. 4. 29. B. The words of an Obligation were *Noverint universi per presentes, me I. S. teneri, &c. W. B.* in ten pound *solvendum eidem I.* And it was holden by the whole Court, that the same did not make the Bond to be void, because it appeared by the promises of the Bond, to whom the mony was in Law to be paid, and the intent so appearing, the Plaintiff might declare of a *solvendum* to himself; and the word (I) should be superfluous. And 22. E. 4. 9. A. B. The Abbot of *Selbyes* case: Where the Abbot of *Selby* did grant *annualem pensionem* to *B. ad rogatum I. E.* *illam scilicet quam I. E. habuit ad terminum vite sua, solvendum quousque sibi, &c. de beneficio provisum fuerit*, and it was holden by the whole Court in a Writ of annuity brought, that [*sibi*] did referre to *B.* the grantee, and not to *I. E.* And *Cook* Chief Justice said, that the original Contract doth leade the measure in this Case; and to that purpose he cited *Kiddwellies* case in the Commentaries, where a Lease was made rendring Rent at Mich. at *D.* and if it were behind by a month after demand, that the Lessor might reenter; the demand must be at the first place, which is in that case alledged to be certain: viz. at *D.* The case was adjorned.

Trinit. 10. Jacobi, in the Common Pleas.

285 *Sir Henry Lea and Henry Leas Case.*

SIR *Henry Lea* was committed to the Fleet, for the disobeying of a Decree made in the Court of Requests: and having Suits depending in the Court of Common Pleas, he prayed a Writ of *habeas Corpus*, which was granted; and upon the return of the Writ, the cause of his Commitment appeared to be for a contempt for

for not performing of the said Decree, and no other cause appeared in the return : and the Court were of opinion, that they could not deliver him, because that no cause appeared in the return to warrant their delivery of him : And the Court said, that if the return be false, yet they cannot deliver the party ; But the party may have his Action of false Imprisonment, if the Imprisonment be not Lawfull : But then it was shewed by *Mountague* Serjeant to the Court, that the Decree was made in the Court of Requests upon a Bill containing this matter, viz. That *Henry Lea* pretending Title unto Lands which *Sir Henry Lea* held by descent from his Unkle *Sir Henry Lea* ; shewed his Title to the Kings Majestie, and thereupon the King upon the Petition of *Henry Lea*, sends for *Sir Henry Lea*, and had speech with him, that he would give unto the said *Henry Lea* some recompence for his Title which he pretended to have to the said Lands : And that thereupon the said *Sir Henry Lea*, at the instance of the Kings Majestie, did promise the King, that if the said *Henry Lea* would not molest him for any of the said Lands, which he had by descent from his said Unkle ; that then he the said *Sir Henry Lea* would give unto the said *Henry Lea* two hundred pound *per Annum* : And for not performance of this promise made to the King, *Henry Lea* Exhibited his Bill in the Court of Requests, upon which the said Decree was grounded : The said *Sir Henry Lea* answered, that he did not know of any such promise he made to the Kings Majestie, and pleaded to the Jurisdiction of the Court : But upon a Certificate made by the Kings Majestie, that he made such a promise unto him, the Court of Requests made the said Decree, which Certificate was mentioned in the body of the said Decree : And *Mountague* prayed, that because it appeared that the said *Henry Lea* had remedy by way of Action upon the case at the common Law, upon the said promise, That this Court would grant a Prohibition in this case unto the Court of Requests, and deliver the party from his Imprisonment. But the Court said, that they would advise of the Case, because they never had heard of the like case. But *Cook* Chief Justice advised *Sir Henry Lea* to agree the matter betwixt Him, and his Kinsman *Henry Lea* ; For he said, that he had learned a Rule in his youth, which was this, viz.

Cum pare luctare dubium, cum Principe stultum est ;

Cum puero pœna ; cum Muliere pudor.

Trinit. 10. Jacobi, in the Common Pleas.

286 GARVEN and PYM's Case.

GARVEN libelled against PYM for a Seat in the Church before the Bishop of Exeter, in the spiritual Court there ; which by Appeal was

was removed into the Court of Arches; And the Defendant did surmise in the Court of Common Pleas, That he and his Ancestors have used time out of mind, &c. to have an Isle with a seat in the said Church, for himself and his family; and thereupon prayed a Prohibition. But because it did appear upon Examination of the party himself, That the Parish have alwayes used to repair the said Isle and seat, the Court would not grant a Prohibition in this case, for that proves that his Ancestors were not the Founders of the said Isle and Seat; Also another man hath alwayes used to sit with him in the same seat, which also proves that it doth not belong to him alone. *Cook* chief Justice said, That if a Gentleman with the assent of the Ordinary, hath built an Isle *juxta Ecclesiam*, for to set convenient Seats for him and his family, and hath alwayes repaired the same at his own costs and charges; In such case, if the Ordinary place another man with the Founder, without his consent, in the same Seat, that he may have his Action upon the Case against the Ordinary: And if he be impleaded in the spirituall Court for such Seat, that a Prohibition will lie: And he said, That the *Heydens* in *Norfolk* have built such an Isle next to the Church, and placed convenient Seats there for them, and their family. But he said, That if a man with the assent of the Ordinary, set up a Seat in *navi Ecclesie* for himselfe, and another man doth pull up the same, or defaceth it, *Trespas vi & armis* will not lie against him, because the Freehold is in the Parson; and he hath no remedy for the same, but to sue the party in the Ecclesiastical Court. And 9. E. 4. 14. the *Dame Wiches* Case was vouched, where she brought an Action of Trespasse against the Parson, for taking away her Husbands Coat-armour, which was fixed to the Church at his Funerall, and it was adjudged that the Action would lie; and so will an Action in such case brought by the heir. And *Cook* said, That the Ordinary hath the onely disposing of Seats in the Body of the Church; with which agrees the opinion of *Hassiey*, in 8. H. 7. And if the Ordinary long time past hath granted to a man and his heirs such Seat, and he and his heirs have used to repair the said Seat: If another will libell against him in the Spirituall Court for the same Seat, he shall have a Prohibition. And he said, That he had seen a Judgement in 6. E. 6. That if Executors lay a Grave Stone upon the Testator in the Church, or set up his Coat-armour in the Church; If the Parson or Vicar doth remove them, or carry them away, that they, or the heir, may have their Action upon the Case against the Parson or Vicar. Note, in the principall, no Prohibition for the reasons before.

Trinit. 10. Jacobi, in the Common Pleas.

287 The Archbishop of York & Sedgwick's Case.

THE Archbishop of York and Doctor Ingram, brought and exhibited a Bill in the Exchequer at York, upon an Obligation of seven hundred pound, and declared in their Bill, in the nature of an Action of Debt brought at the common Law: which matter being shewed unto the Court of Common Pleas by Sedgwick, the Defendant there; A Prohibition was awarded to the Archbishop, and to the said Court at York. And Cook chief Justice gave the reasons, wherefore the Court granted the Prohibition. 1. He said, because the matter was meerly determinable at the common Law; and therefore ought to be proceeded in according to the course of the common Law. 2. Although the King hath granted to the Lord President, and the Council of York, to hold pleas of all personall Actions, yet (he said) they cannot alter the form of the proceedings. For as 6. H. 7. 5. is, The King by his Grant cannot make that inquirable in a Leet, which was not inquirable there by the Law; nor a Leet to be of other nature then it was at the common Law. And in 11. H. 4. it is holden, That the Pope, nor any other person can change the common Law, without a Parliament. And Cook vouched a Record in 8. H. 4. That the King granted to both the Universities, that they should hold plea of all Causes arising within the Universities, according to the course of the Civil Law; and all the Judges of England were then of opinion, That that grant was not good, because the King could not by his Grant alter the Law of the Land; with which case agrees 37. H. 6. 26. 2. E. 4. 16. and 7. H. 7. But at this day, by a speciall Act of Parliament, made 13. Eliz. not printed. The Universities have now power to proceed and judge according to the Civil Law. 3. He said, That the Oath of Judges, is, viz. You shall do and procure the profit of the King, and his Crown, in all things wherein you may reasonably effect and do the same. And he said, That upon every Judgement upon debt of forty pound, the King was to have ten shillings paid to the Hamper, and if the debt were more, then more. But he said, by this manner of proceeding by English Bill, the King should lose his Fine. 4. He said, That if it was against the Statute of Magna Charta, viz. *Nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terra.* And the Law of the Land, is, That matters of fact shall be tried by verdict of twelve men; but by their proceedings by English Bill, the partie should be examined upon his oath; And it is a Rule in Law, That *Nemo tenetur seipsum prodere*: And also he said, That upon their Judgement

there, no Writ of Error lyeth: so, as the Subject should by such means be deprived of his Birth-right. 5. It was said by all the Justices, with which the Justices of the King's Bench did agree; That such proceedings were illegall. And the Lord Chancellor of England would have cast such a Bill out of the Court of Chancery: And they advised the Court of York so to do: and a Prohibition was awarded accordingly.

Trinit. 10. Jacobi, in the Common Pleas.

288 DOCTOR HUTCHINSON'S CASE.

DOCTOR *Hutchinson* libelled in the Spirituall Court against one of his Parishioners for Tithes; The Defendant there shewed, that the Doctor came to the Parsonage by Symony and Corruption: And upon suggestion thereof made in the Common Pleas, prayed a Prohibition. Doctor *Hutchinson* alledged that he had his pardon, and pleaded the same in the Spirituall Court. And notwithstanding that, the Court granted a Prohibition, because the Pardon doth not make the Church to be *plena*, but maketh the offence onely dispunishable. But in such case, If the King doth present, his presentee shall have the Tithes.

Trinit. 10. Jacobi, in the Common Pleas.

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NOTE, by *Cook* Chief Justice, that these words, viz. Thou wouldest have taken my purse from me on the high way, are not actionable; But Thou hast taken my money, and I will carry thee before a Justice, lay felony to thy charge, are actionable.

Mich. 11. Jacobi, in the Common Pleas.

290 HATCH and CAPEL'S CASE.

IN an Action upon the Case upon an *Assumpsit* brought against the Defendant, The Plaintiffe declared, How that one *Hallingworth* who was the Defendants Husband, was indebted unto the Plaintiffe eight pound ten shillings for beer; and that he died, and that after his death the Plaintiff demanded the said mony of the Defendant his wife; and she, in consideration that he would serve her with beer, promised that

that she would pay unto the said Plaintiff eight pound ten shillings, and for the rest of the beer, at such a day certain. And the Plaintiff did aver, That he did sell and deliver to her Beer, and gave her day for the payment of the other money, as also for the Beer delivered unto her; and that at the day she did not pay the Money. Cook and all the other Justices agreed, That the Action would well lie, and that it was a good Assumpsit, and a good consideration; for they said, That the forbearance of the money is a good consideration of it selfe; and they said, That in every Assumpsit, he who makes the promise ought to have benefit thereby; and the other is to sustain some losse. And judgement was given for the Plaintiff.

Mich. 11 Jacobi, in the Common Pleas.

In the Case of a Prohibition, the Case was this, Queen Elizabeth was seised of the Manor of *Nammington*, which did extend into four Parishes, viz. *Stangrave* and three other. And the Plaintiff shewed, That he was seised of three Closes in *Stangrave*; and prescribed, That the said Queen, and all those whose Estate he hath in the said Closes, had a *Modus decimandi* for the said three Closes, and for all the Demeanes of the said Manor in *Stangrave*. And whether the *Venire facias* should be *de parochia de Stangrave*; or of the Manor, was the question. And it was resolved by the whole Court, That the *Venue* should be of the Parish of *Stangrave* and not of the Manor. And the Difference was taken, when one claimes any thing which goes unto the whole Manor, and when only to parcel of it; for in the one Case the *Venue* shall be of the Manor, in the other not; *Vide* 9. *Eliz. Dyer. ar.* But it was said, That in this Case the *Modus* did extend only to things in *Stangrave*, and therefore the *Venue* should be of *Stangrave* only. *Nichols* Justice said, That although the Parish be a Town, and of one name, yet the *Venue* shall be from the Parish, to which the Court agreed. And in the principall Case, the Pleading was, That the Manor was in *Parochia*, and the *Modus* alledged to be in *Parochia*, and the Prohibition *de Parochia*; and therefore the *Venire facias* ought to be *de Parochia*, and not *de Manerio*, or *de Vill.* Cook cited 4. *E. 4.* and 23. *E. 4.* that in *Trespas de Parochia* is a good addition, for it shall not be intended, that there are two Towns in one Parish: And it was said by the Court in this Case, That before the Statute of 2. *E. 6.* all Prohibitions to the Spirituall Court were *quia secutus est de Laico feodo*: for when a man had a *Modus decimandi*, the Corn and other things were

lay things. Then it was moved by a Serjeant at Bar, That at the Assizes where the tryall of the *Modus decimandi* was, one of the principal Panel did appear only upon the *Venire facias*; and the question was, If in such Case a *tales* might be awarded *de circumstantibus*. And it was holden by the Court, that such *tales* might be well awarded; and 10. *Eliz. Dyer* vouched to prove the same. It was also said by the Court, That at the common Law (if not in appeal) the *tales* might be of odd number, as *quinque tales*, or *novem tales*; but now since the Statute of 35. *H. 8.* the *tales* may be even or odd, as pleaseth the party. But it was adjudged in this Case, That in no Case where a triall is at the Bar, shall any *Tales de circumstantibus* be awarded. And so are all the Presidents.

Mich. 11. Jacobi, in the Common Pleas.

292

LEIGHTON against GREEN and GARRET.

T *Thomas Leighton* an Administrator *durante minori etate* of *J. S.* did libell in the Court of Admiralty against the Defendants; and shewed in the Libel, That there were Covenants made betwixt them by a Charter party, they being Owners of the Ship called the *Mary* and *John* of *Lynn*, that the Defendants should victuall the said Ship for a Voyage into *Denmark*; and that the Ship should be staunch and without leak. And shewed in his Libel, that the Ship being upon the Seas did spring a leak, by reason of which the Plaintiff did lose a great part of the Freight of the said Ship, consisting in divers Commodities, viz. Coney skins. The Defendant pleaded, That the Covenants were made *infra Portum de Lynn*: And further pleaded, That the Plaintiff had before that time brought an Action of Covenants against the same Defendant, upon the same Deed, in which Action the Plaintiff was Non-suit; and it was adjudged, That it was a good Plea in Bar; and thereupon a Prohibition was awarded to the Court of Admiralty. *Cook* Chief Justice in this Case said, That charter party, *est charta partita*, and is all one in the Civil Law, as an Indenture is in the Common Law. And in this Case it was adjudged, That the Triall should be there where the contract was made; and so was it adjudged in *Constantine* and *Gynns* Case. Where the Originall Act was in *England*, and the subsequent matter upon the Sea, the Tryall shall be where the Originall Act is done. And so it was agreed in this Case, that the Tryal should be.

Mich.

Mich. 11 Jacobi, in the Star-Chamber.

293

MILLER against REIGNOLDS and BASSET.

SIr Henry Mouniagn the Kings Serjeant did informe the Lords in the Star-Chamber, How that the Defendants had conspired and practised *Maliciose* to draw the Plaintiffs life in question, being a man of One thousand Pounds *per annum*, and otherwise very rich: The Case was shortly thus, *Basset* the Defendant was Tenant unto the Plaintiffe of a house in R. in Kent, rendring a Rent; the rent was behind, and the Plaintiff demanded his Rent of him; the Defendant told him, That he was not able to satisfie him the Rent, but he promised to give unto the Plaintiffe all his Goods in satisfaction of the Rent, or so many of them as should countervale the Rent; and it was agreed betwixt the Plaintiff and the Defendant *Basset*, that the Goods should be apprifed by two men, which was done accordingly, and the Plaintiff came to the Defendants house at the time the said Goods were apprifed, but it was deposed and proved, did not go out of the room where the apprifement was made at the time he was in the said house, which was the 10 of May 7. *Jacobi, ar.* Afterwards the Defendants, *Reignolds* (being an Attorney at Law) and *Basset* did conspire to accuse the Plaintiffe, because that when he came to the Defendant *Basset*s house at the time of the apprifing of the said Goods, that the Plaintiffe went up into an upper Chamber in the said house, and broke up a Chest, and out of the same took a Gold Ring, 10. s. in Money, and the Defendant *Basset*s Lease of his house; and thereupon brought the Plaintiff before divers Justices of the Peace, who upon Examination of the matter, found no ground of suspicion against the Plaintiff, and therefore they did not bind him over to the Sessions to answer the same Accusation. After this the Defendants made severall motions to the Plaintiff that he would give unto them 300 l. and so he should be acquitted, and there should be no proceeding against him; and because the Plaintiffe refused so to do, they told him that divers Courtiers had begged his Estate of the King, and that the same was granted unto them; when as in truth, there was not any thing moved to any Courtier of any such matter, but all this was said in a shew only, to the end they might get great sums of mony from him. And in that matter they layed the scandall upon *S. Rob. Car* then Viscount *Rocheſter*, that he was made privy to it, who then was the Kings Maj. great Favorite. And when all this could not prevail to gain any Composition from the Plaintiff, the Defendants did prefer a Bill of Indictment at the Assizes in Kent against the Plaintiff; and there, upon Evidence given unto the Grand Jury, they found an *Ignoramus* upon

on the Bill : and divers other plots and divises were contrived by the Defendants, & all to the end, the Plaintiff might lose his life & his estate. And this matter came to Sentence before the Lords, and the Bill proved in every point and circumstance, as well by the confession of the Defendants themselves, as by divers writings, depositions of witnesses, and letters read and shewed in open Court ; and it was said by the whole Court of Lords in this case, that this was a very great offence, and an offence *in Capite* ; and that if such practices should be suffered and go unpunished, that no mans life was in safety, but in continual jeopardy : And therefore in this case, it was said, that pregnant presumption had been sufficient to have acquitted the Plaintiff ; but here the case was very cleer, because the matter was confessed by the parties Defendants themselves. And in this case, Cook Chief Justice, and the Lord Chancellour said, that a conspiracy ought not to be onely false, but *maliciose* contrived, otherwise it will not be a conspiracy, and such malice ought to be proved: For if a poor Man travelling upon the High-way, be robbed by another Man, and he knows not the party, if afterwards he do accuse such a one of the Robbery, and the party accused be found not Guilty ; he shall not have an Action of conspiracy against the accuser ; for although he was falsely accused, yet he was not maliciously accused; and it might be, that he took him to be the Offender, because he was like unto him who robbed him. Secondly, It was said by them, that by the Law, no Man may Begg the Lands or Goods of another man upon such an accusation, until the party be convict of the fact ; and that for divers causes. 1. Because before conviction, the King hath not an Interest in them; for the goods are not forfeit. And 2. Because the party till his conviction, ought to have his goods to maintain himself with them. And 3. Because the goods cannot be seised upon for the Kings use before conviction, although they may be put *in salva custodia* ; and therefore they said, that this was a very great slander which the Defendants layed upon the Lord Viscount Rochester, viz. that he had begged the Plaintiffs goods of the King before he was convicted ; and it was said, that if such goods should be begged before conviction of the party, that the same would be a main cause, that the Jury will not find the Indictment against the party, when they are sure his Lands, goods, and other estate shall be in anothers person, and so by consequence should be a great cause that the King might be defrauded of the forfeiture of the goods of Fellons : and further, it would be a great cause of Rebellion, if such Lands and goods should be seised upon and given away before conviction of the party accused. And as the Lord Chancellour said, the same was the cause of the great Rebellion in the time of King Henry the sixth, because the goods of divers were given away to other men before the parties were convicted : And Cook said, that it appeareth

perceiveth, that this was not onely a scandal of divers Gentlemen of Worship whom the Defendants had abused in this thing, But even of the King himself: And it was not onely *scandalum Magnatum*: But *scandalum Magistr. Magnatum*: And he said, that it appears in *Britton*, that if a Rebel or base fellow do strike a Man of Dignity, that he shall lose his right hand: *a fortiori*, in such case when they defame and scandalize them by such impudent practices, that they be grievously punished: And it should be a very unhappy estate to be a Rich-Man, if such Offences should not severely be punished, & *multi delicti propter inopiam*. The Sentence against the said Defendants was this: *Reignolds* being an Attorney to be degraded, cast over the Common Pleas Barre, and both the Defendants to lose their Eares; to be marked in the Face with a C. for Conspirators, to stand upon the Pillory with Papers of there Offences, to be Whipped, and each of them fined to the King in 500. pound: and according to this Sentence, *Reignolds* the same Mich. Term was cast over the Common Pleas Barre by the Cryers of the Court; and the other part of the Sentence executed on them both.

Mich. 11. Jacobi, in the Common Pleas.

294 COOKES Case.

IN a Writ, *Quare intrusit, maritaggio non satisfacto*: It was found for the Plaintiff, but no damages were assessed by the Jury; and the value of the Marriage was found to be 500. pound. And now the question was, whether the same might be supplied by a Writ of Enquire of Damages, and the Court *prima facie* seemed to doubt of the case: For where the party may have an attainment, there no damages shall be assessed by the Court, if the same be not found by the Jury; and therefore the Court would be advised of it: but afterwards in the same Term it was adjudged, that no Writ of Enquire of damages should Issue; But a *venire facias de novo* was granted to try the Issue again. *Vide 44. E. 3.* the opinion of *Thorpe* acc. Note, this was the last Case that *Cook* Chief Justice did speak to in the Common Pleas, for this day he was removed from that Court, and made Chief Justice of the Kings Bench.

Mich. 11. Jacobi, in the Common Pleas.

295 WEDLOCK and HARDING's Case.

THE Case was this: a Man seised of a Messuage holden in Socage in Fee, by his will in Writing devised the same to his

his Cosen by these words, viz. I devise my Messuage where I dwell to my Cosen *Harding*, and her Assignes, for eight years. And also my Cosen *Harding* shall have all my Inheritances, if the Law will. And it was adjudged by the whole Court without argument, That this was a devise of the Messuage in Fee by these words, and that all his other Inheritances passed by the said Will by those generall words.

Mich. 11. Jacobi, in the Common Pleas.

296 ROSSER against WELCH and KEMMIS.

IN an Action of Debt brought against the Defendants, upon severall *Pracipes* one Judgement is given; and the Plaintiffe takes forth a *Capias* against one of them, and arrests his body, and afterwards hee takes a *Fieri facias* against the others: And the question was, Whether the severall Executions should be allowed? and the Court was of opinion, they should not; for that a man shall have but one satisfaction. And therefore in the principall Case, because that upon the *Fieri facias* twenty five pounds was levied; if the other who is in prison upon the Execution will pay the other twenty five pound, (the whole Judgment being but fifty pound) the Court awarded that the prisoner should be discharged: and the Court was clear of opinion, that the partie cannot have a *Fieri facias* against one, and a *Capias ad satisfaciendum* against the other: But it was agreed, That he might have a *Capias* against them both. As if a man hath one Judgement against seven persons, he may take all their bodies in execution, because the body is no satisfaction, but onely a gage for the Debt; and therewith agreeth 4. H.7.8. § E.4.4. and C. 5. part *Bamfeild's* Case.

Mich. 11. Jacobi, in the Common Pleas.

297 JENOAR and ALEXANDER's Case.

IT was moved for a Prohibition to the Court of Requests, because that the Court held plea of an Attornment; for the complaint there was to compel a man to attorn upon a Covenant to stand seised to uses. And *per Curiam* a Prohibition shall be awarded. And *Cook* chief Justice said, That there were three Causes in the Bill, for which a Prohibition should be granted, which he reduced to three Questions. 1. If a Copy-holder payeth his rent, and the Lord maketh a Feoffment of the Manor, Whether the Copy-holder shall be compelled to attorn? 2. If a man be seised of Freehold Land, and Covenants to stand seised to an use, Whether

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in such case an Attornment be needfull? 3. If a Feoffment be made of a Manor by Deed, Whether the Feoffee shall compell the Tenants to attorn in a Court of Equity? And for all these Questions, It was said, That the Tenants shall not be compelled to attorn; for upon a Bargain and Sale, and a Covenant to stand seised, there needs no attornment. And *Cook* in this case said, That in 21. E.4. the Justices said, That all Causes may be so contrived, that there needed to be no Suit in Courts of Equity; and it appears by our books, That a Prohibition lies to a Court of Equity, when the matter hath been once determined by Law. And 13. E.3. *Tit. Prohibition*, and the Book called the Diversity of Courts, which was written in the time of King *Henry* the eighth, was vouched to that purpose: And the Case was, That a man did recover in a *Quare Impedit* by default; and the Patron sued in a Court of Equity, viz. in the Chancery: and a Prohibition was awarded to the Court of Chancery.

Mich. 11: Jacobi, in the Common Pleas.

298 Sir JOHN GAGE and SMITH's Case.

AN Action of Waste was brought, and the Plaintiffe did declare, that contrary to the Statute, the Lessee had committed Waste and Destruction in uncovering of a Barn, by which the timber thereof was become rotten and decayed; and in the destroying of the stocks of Elmes, Ashes, Whitethorn, and Blackthorn, to his damage of three hundred pound. And for title shewed, That his Father was seised of the Land, where &c. in Fee, and leased the same to the Defendant for one and twenty years, and died; and that the Land descended to him as his son and heir; and shewed, that the Waste was done in his time, and that the Lease is now expired. The Defendant pleaded the generall issue, and it was found for the Plaintiffe, and damages were assessed by the Jury to fifty pound. And in this case it was agreed by the whole Court, 1. That if six of the Jury are examined upon a *Voyer dire*, if they have seen the place wasted, that it is sufficient, and the rest of the Jury need not be examined upon a *Voyer dire*, but onely to the principall. 2. It was agreed, if the Jury be sworn that they know the place, it is sufficient, although they be not sworn that they saw it; and although that the place wasted be shewed to the Jury by the Plaintiffs servants, yet if it be by the commandment of the Sheriffe, it is as sufficient, as if the same had been shewed unto them by the Sheriffe himselfe. 4. It was resolved, That the eradicating of Whitethorn is waste, but not of the Blackthorn; according to the Books in 46. E.3. and 9. H. 6. but if the blackthorn grow in a hedg, and the whole hedg be destroyed the same is Waste by *Cook* chief Justice. It was holden al-

o, that it is not Wast to cut Quick-set hedges, but it shall be accounted rather good husbandry, because they will grow the better. 5. It was agreed, That if a man hath under-woods of Hasell, Willowes, Thornes, if he useth to cut them, and sell them every ten years; If the Lessee sell them, the same is no wast; but if he dig them up by the roots, or suffereth the Germinds to be bitten with cattel after they are felled, so as they will not grow again, the same is a destruction of the Inheritance, and an Action of wast will lie for it. But if he mow the Stocks with a wood-sythe, (as he did in the principall Case) the same is a malicious Wast; and continuall mowing and biting is destruction. 6. It was said, That in an Action of Wast a man shall not have costs of Suit, because the Law doth give the party treble damages. And when the generall issue (*Nul. Wast*) is pleaded, and the Plaintiff counted to his damages 100^l. the Court doubted whether they could mitigate the damage. But 7. It was agreed, That in the principal Case, (although the issue were found for the Plaintiff;) that he could not have judgment, because he declared of Wast done in 8. several closes, to his damage of 300^l. generally, and did not sever the damages. And the Jury found, That in some of the said Closes there was no Wast committed. Wherefore the Court said, he could not have judgement through his own default. But afterwards at another day, *Hobart* then chief Justice, and *Warburton* Justice, said, That the verdict was sufficient, and good enough; and so was also the declaration, and that the Plaintiffe might have judgment thereupon. But yet the same was adjourned by the Court untill the next Term.

Mich. 11. Jacobi, in the Common Pleas.

299

CLARK'S Case.

NOte, It was said by Cook, chief Justice, and agreed by the whole Court, and 41. and 43. *E. 3. &c.* That if a man deliver money unto *I. S.* to my use, That I may have an Action of Debt, or account against him for the same, at my election. And it was agreed also, That an Action of Trover lieth for money, although it be not in bags: but not an Action of *Detinere*.

Mich. 11. Jacobi, in the Common Pleas.

300

IRELAND and BARKER'S Case.

IN an Action of Wast brought, the Writ was, That the Abbot and Covent had made a Lease for years, &c. And it was holden by the Court

The Dean, &c. of Winsor and Webb's Case. 211

Court that it was good, although it had been better, if the Writ had been, That the Abbot with the assent of the Covent made the Lease, for that is the usuall form; but in substance the Writ is good, because the Covent being dead Sons in Law, by no intendment can be said to make a Lease; But the Dean and Chapter ought of necessity to joyn in making of a Lease, because they are all persons able; and if the Dean make a Lease without the Chapter, the same is not good, *per curiam*, if it be of the Chapter Lands. And in *Adams and Wrotesley's Case*, *Harris* Serjeant observed, That the Lease is said to be made by the Abbot and Covent; and it is not pleaded to be made by the Abbot with the assent of the Covent.

Mich. 11 Iacobi, In the Common Pleas.

301 *The Dean and Canons of Winsor and Webb's Case.*

IN this Case it was holden by the Court, That if a man give Lands unto Dean and Canons, and to their Successors, and they be dissolved; or unto any other Corporations; that the Donor shall have back the Lands again, for the same is a condition in Law annexed to the Gift; and in such Case no Writ of Escheat lieth, yet the Land is in him in the nature of an Escheat. And the principall Case was, That a prescription was shewed of a discharge of Tithes in an Abbot, Prior, and Covent, and that the Corporation was afterwards dissolved, because all the Monks died, and the Abbot also. And it was holden by the Court, That he who is now Owner of it, and holdeth the Lands, shall pay Tithes; for a Lay man cannot prescribe in *Non decimando*; and the Prescription continues no longer then the Lands continued in the Abbot and Covents hands. And in this Case it was said by *Cook*, That there are only three manner of Escheats: 1. *Abjurat Regnum*. 2. *Quia suspensus per collum*. 3. *Quia utlagatus*: But because they sued for the treble value in the Spiritual Court, a Prohibition was awarded; but the Parson may sue for the double value in the Spirituall Court, and no Prohibition will lie, for that is given by the expresse words of the Statute of 2. E.6. and so it was adjudged in *Manwoods Case* in the Exchequer. And the word [Forfeiture] in the Statute doth not give the treble value to the King, but to the Parson himself. Also it was holden by *Cook* and *Warburton*, Justices, That if a Rent be granted to one and his Successors, and the Corporation be dissolved, that the Rent shall revert to the Donor: and there is no difference as to the matter, betwixt things which lie in Prender, and things which lie in render. *Nichols* Justice contrary, That the Rent extinguishes in the Land it self. And in the principall Case, because they sued in the Spirituall Court for the treble value, a Prohibition was granted

Mich. 11. Jacobi, in the Common Pleas.

302

P O R T E R ' S C a s e .

IN a Writ of Dower brought, the Defendant was effoynged, and had the view, and afterwards pleads *tout temps prist* to render Dower; and they were at issue, which was found for the Plaintiff, and Judgment was given for the Plaintiff. It was holden by the whole Court, That before Execution be awarded, the Plaintiff in Dower may aver, That her husband was seised to have Damages; and therewith agrees the books 14. H. 8. 25. 22. H. 6. 44. b.

Mich. 11. Jacobi, In the Common Pleas.

303

S I R D A N I E L N O R T O N and S Y M M ' S C a s e .

AN Action of Debt was brought upon a Bond, which was conditioned to performe Covenants in an Indenture; and it was shewed there were divers Covenants in the Deed, some of which were Covenants against the Law, and some not; and for breach, the Plaintiff alledged, That it was covenanted by the Indenture, that *Chamberlain*, for whom the Defendant was a Surety, being under Sheriff to the Plaintiffe, should save the Plaintiffe harmeleffe, and should discharge all manner of escapes, and should also save him harmeles from all Fines and Amercements to which he should be liable by reason of any escape. And shewed, how that one was arrested in execution by the said *Chamberlain*, & *evadit*. And another Covenant was, That hee should not serve any Execution above Twenty Pounds, without Warrant from the Plaintiffe; and also that he should not return any Juries without his Privity. *Hutton* Serjeant argued for the Defendant and said, That this Indenture of Covenants was against the Law, for it is as much as if he had said, That he should not be under Sheriff. And by the Statute of 27. *El.* under Sheriffs are sworn to return Juries, and process of Courts, and therefore these Covenants are both against the common Law and Statute Law; also the Covenants are in delay of Justice; for *Non constat* when the Sheriffe will give him warrant to return Juries, or to execute the Kings Writs. Also the Covenant is too generall, *viz.* That he shall save him harmeleffe from all Escapes, and of any other matters whatsoever; and there the Bond taken to performe such Covenants is void. *Vide* 7. H. 7. and 8. *E.* 4. 13. where a Bond taken to save a man harmeleffe against all men, is void: but contrary if it be to save harmeleffe against one particular person: so here, to save harmeles from all

all matters whatsoever, is void; but if it had been only from Escapes, then it had been good. *Vide* 2.H.4.9. If a man be bound to save another harmlesse against all the world, the Bond is void, *Vide* 4. H.4. 2. *Will. Rices* case. And he compared these Covenants against the Law to Perpetuities which kill themselves. Then he argued, That although some of the Covenants were lawfull, yet the Bond was void in all; and that, he said, is the better opinion of the book in 14. H. 8. 25. And if *A.* be bounden to enfeoff *J. S.* of the Manor of *D.* and to disese *J. N.* of another Manor, the Bond is void for the whole. 3. He said, That there was not a sufficient breach laid by the plaintiffe; for it is only layed, That such a one in Execution *evafit*; and it is not said, That the under Sheriff did suffer him to escape. 4. It is not layed, That the plaintiff did request the under Sheriffe to pay the Money upon the escape, but he went and paid the Money voluntarily of himself, and request and notice are needfull; 46. E. 3. 27. 22. E. 4. 14. 40. E. 3. 20 *Non damnificatus* is a good plea generally; and the other side ought to come and shew specially how he is damnified. 5. It is not layed, That he gave him warning to arrest the party in Execution for Fifty pounds; and therefore as to that, he was not under Sheriff, because as Sheriff, without warning, by his former Covenants, hee was not to serve any Executions, but such as were under Twenty pounds; and therefore he ought to have layed it, That he gave him a Warrant to arrest the party upon this Execution, otherwise there is no breach. *Harris* Serjeant contrary, and he said, The Covenants are sufficient in part, and ought to be performed; and so the Bond good. And as *Kible* said in 13. H. 7. 23. so he said, That there are three conditions which are not allowable, but the Case at Bar is not within the compasse of any of them; and the words here [Discharge and save harmlesse] shall be meant from all escapes suffered by the under Sheriff himself; and the words [from all Amercements whatsoever] shall be intended by reason of his Office: And he said, That when an Indenture of Covenants is good in part, and void in part, those Covenants which are good shall stand and ought to be performed; and the book of 14. H. 8. by four Justices, is, that all legal and lawful Covenants ought to be performed: and he vouched *Lee* and *Golshills* Case 39. *Eliz.* which *Vide* c. 5. 3 Co. 82. b. 61 part 82. to that purpose; and he said, that this Case is not like the case in 9. *Eliz.* *Dyer*, of *Raisure*: Also, he said, that the Defendant hath pleaded. That he hath performed all the Covenants; and if these Covenants be void, and no Covenants, then the Defendants plea is not good. Also there are divers Covenants in the Negative, and to those he ought in pleading to shew in certain that he hath not broken them. The Court said, nothing at all to the case; but yet *Cook* chief Justice seemed to be cleer of opinion; That the Bond was void; and so he said, he conceived it had been adjudged before in this Court in the same Sir *Daniel Norton's* case against *Chamberlain*, *Pasch.* 9. *Jacobi*, *Rs.* And it was adjourned.

Mich.

Mich. 11. Jacobi, in the Common Pleas.

304

AN Action upon the Case was brought by an Attorney of the Court against another Man, for speaking these words of him, viz. Thou art an Ambodexter; and the words were adjudged actionable, because the same slandered him in his Profession, for it is as much in effect as if he had said, that he was corrupt in his Office.

Mich. 11. Jacobi, in the Common Pleas.

305

IT was Ruled by the whole Court, that a *Fieri facias*, or *Capias ad satisfaciendum*, or other Judicial Process did not run into *Wales*; But it was agreed that a *Capias utlagatum* did run into *Wales*: And *Brownlor*, one of the Pronothories, said, that an Extent hath gon into *Wales*.

Mich. 11. Jacobi, in the Common Pleas.

306

HUGHE'S Case.

A Man who dwelt in *Somersetshire* made his Will, and by his said Will did bequeath to each of his children being Enfants, a Legacy of 20. pound a piece: the Procurators of the Enfants did Libel in the Court of Arches against the Executors of the Testator, for the said Legacies, being out of the Diocess, and a Prohibition was awarded: and in this Case it was said by Justice *Warburton*, to have been agreed by all the Justices, that the exception in the Statute of 23. *H. 8. cap. 9.* doth extend onely to probate of Wills. It was also holden in this case, That an Averment might be, that the parties were sued out of there proper Deocefs, if the same doth not appeare in the Libel: as it may be in like case where one sueth in the Court of Admiralty for a thing done upon the land; and Averment may be, that the contract was made *infra Corpus Comitatus*. And in this case it was also agreed by the Court, that if an Infant bringeth an action against his Gardian for mony, and recovereth, and he bringeth the mony into Court, and there deposite it, that the same is a good discharge against the Infant, and he shall not answer the Suit again in an account.

Mich.

Mich. 11. Jacobi, in the Common Pleas.

307 Sir THOMAS SEYMORE'S CASE.

Mountague Serjeant shewed to the Court, that the Wife of Sir Thomas Seymore did Libel against her Husband in the Spiritual Court, for that he did threaten her, and beat her; and in the end of the Libel she prayed allowance of Allimony; and a Prohibition was prayed by him, because the Suit in that Court was for a force, which was not triable in that Court; and to that purpose he remembered the case of 11. H. 4. 88. Where a Clark sued in the Spiritual Court for a battery, and laying of violent hands upon him, and because in such case an action of Trespas of assault and battery did lye at the Common Law, a Prohibition was awarded, *Vide.* 22. E. 4. 29. pl. 9. the Abbot of St. Albans case, and 12. H. 7. 23. Cook Chief Justice agreed all those Cases: And said, that if a Clark sueth in the Spiritual Court for damages, a Prohibition shall be awarded; and no damages are given in the Spiritual Court, if not for repairing of the Church, as appeareth by the Statute of *Articuli Cleri. Quare & Vide.* 20. E. 4. 10. *professione Fidei, &c.* And Linwood saith, that if a Clark walketh in his doublet and hose, & *non habet habitam Clericalem*, but goeth in colours; if another man doth beat him, he shall not sue for the same in the Spiritual Court: But in the principal Case it was agreed by the whole Court, that no prohibition should be awarded, because the Wife cannot have remedy against the Husband at the Common Law for the beating of her, because she is *sub virga viri*; and also because the Suit there is, but by way of inducement, to have a Divorce *causa meus.* And Warburton said, that she should recover there *expensas litis* against her Husband. Cook held, that the Husband could not give correction to his Wife: But Nicols and Warburton Justices, held the contrary; and that the Wife may have a Writ *de securitate Pacis* against the Husband, as appeareth by F. N. B. 80. f. *quod benè & honestè tractabit & gubernabit, nec malum aliquod ei aliter quàm ad virum suum causa regiminis & castigationis uxoris suae, licitè & rationabiliter pertinet, non faciet &c.* and F. N. B. 238. f. *acc.* Cook vouched 31. E. 3. Fitz. Tit. *Attachment for Prohibition* 8. where the Wife Libelled against her Husband in the Spiritual Court for beating and imprisoning of her, and no Prohibition was granted, and the Suit in the Spiritual Court was there as an Inducement to have a Divorce.

Mich.

Mich. 11. Jacobi, in the Common Pleas.

308

PAYNE'S Case.

IT was moved by *Hutton* Serjeant, for a Prohibition to the Court of Requests: The Case was this, A man in consideration, That *Alice S.* would obtain the good will of his Master, that hee the Defendant might have a shop in his Masters house, did promise her, that when she was married, that he would give unto her ten pound; And the Plaintiff shewed, That she did get the good will of her Master, and that the Defendant had a shop in his Masters house, and that she the said *Alice* was afterwards married to the Plaintiff *Payn*. And the opinion of the whole Court was, That a good Action upon the Case would lie upon such promise. And a Prohibition was awarded unto the Court of Requests; a Suit being there brought for the same matter; which matter being a thing meerly triable at Law, and not in a Court of Equity, that Court had no Jurisdiction of it.

Mich. 11. Jacobi, in the Common Pleas.

309

M*ountague* Serjeant, demanded the opinion of the Justices in a Case upon the Statute of 3. *Jacobi*, of Recusants, in the behalfe of the University of *Oxford*. viz. That if a Recusant convict do avoid, the said Statute, doth grant his Patronage for years to one of his friends in trust; Whether the same were void, or not within the said Statute? The Justices did deny to deliver any opinion in the case, for they said, perhaps it might be that that point and case might come judicially before them; and such they said was the answer of *Hussey* in 1. *H. 7.* in *Humfrey Staffords* case, which was, King *Henry* the seventh came in *Bance*, and demanded a question of the Justices. But yet the Court *tacite* seemed to agree, That such a Lease of the Patronage was void by the said Statute of 3. *Jacobi*. And they said, That they would not have the University discouraged in the case, which implied their opinions to be for the University. And 21. *H. 7.* was vouched, That the Patronage was only matter of favour, and was not a thing valuable; And in this case *Cook* chief Justice said, That *Aperius hereticus melius est quam filius Catholicus.*

Mich. 11. Jacobi, in the Common Pleas.

310

BOND and GREEN'S Case.

AN Action of Debt was brought against an Administrator, the Defendant shewed how that there were divers Judgments had against him in *London*; And also that there was another Debt due by the Testator, which was assigned over unto the Kings Majesty, and so pleaded, That

That he had fully Administred. *Barker* Serjeant took Exception to the pleading, because it was not therein shewed that the King did assent to the Assignment; and also because it was not shewed, that the Assignment was enrolled. The Court said nothing to the Exceptions; But whereas the Defendant as Administrator, did alledge a Retayne in his own hands for a debt due to himselfe; The opinion of the whole Court was, that the same was good, and that an Administrator might retayne to satisfie a debt due to himselfe. But it was agreed by the Court, That an Excecutor of his own wrong, should not Retayne to satisfie his own debt; See to this purpose, *C. 5. part Coulters Case.*

Mich. 11. Jacobi, in the Common Pleas.

311 STROWBRIDG and ARCHERS Case.

IN AN Action of debt upon a Bond the Defendant was Outlawed. And the Writ of Exigent was, viz. *Ita quod habeas corpus ejus hic &c.* whereas it ought to be *coram Justiciariis nostris apud Westminster*: And for that defect the utlagary was reversed, and it was said, that it was as much as if no Exigent had been awarded at all: And upon the Reverfall of the utlagary, a Supersedeas was awarded; and the party restored to his goods which were taken in Execution upon the *Capias utlagatum*. It was also resolved in this Case, That if the Sheriffe, upon a Writ of Execution served, doth deliver the mony or goods which are taken in Execution to the Plaintiffs Atturney, it is as well as if he had delivered the same to the Plaintiff himself; for the Receipt by his Atturney is in Law his own Receipt. But if the Sheriff taketh goods in Execution, if he keep them, and do not deliver them to the party at whose suit they are taken in Execution, the party may have a new Execution, (as it was in the principal Case) because the other was not an Execution with Satisfaction.

Mich. 11. Jacobi, in the Common Pleas.

312 CHAVVNER and BOVVES Case.

BOWES sold three Licences to sell Wine unto *Chavvner*; who Covenanted to give him ten pounds for them; and *Bowes* Covenanted that the other should enjoy the Licences. It was moved in this Case, whether the one might have an Action of Covenant against the other in such Case: And the opinion of *Warburton* and *Nichols* Justices, was, That if a Man Covenant to pay ten pound at a day certain, That an action of Debt lyeth for the money, and not an action of Covenant. *Barker* Serjeant, said, he might have the one or the other: But in the principall Case the said Justices delivered no opinion.

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Note, That this Day *Cooke* Chief Justice of the Common Pleas, was removed to the Kings Bench, and made Lord Chief Justice of England. And Sir *Henry Hobart*, who was the Kings Attorney generall, was the day following made Lord Chief Justice of the Court of Common Pleas. Sir *Francis Bacon* Knight, who before was the Kings Solicitor, was made Attorney Generall. And Mr *Henry Telverton* of Grays-Inn was made the Kings Solicitor: and this was in *October, Term. Mich. 11 Jacobi. 1613.*

Mich. 11. Jacobi, In the Common Pleas.

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THis Case was put by *Montague* the Kings Serjeant, unto the Lord Chief Justice *Hobart*, when he took his place of Lord Chief Justice in the Common Pleas; viz. Tenant in taile the Remainder in taile, the Remainder in Fee; Tenant in tail is attainted of Treason, Offence is found: The King by his Letters Patents granteth the lands to *A*, who bargaineth and selleth the land by Deed unto *B. B.* suffers a common Recovery, in which the Tenant in tail is vouched, and afterwards the Deed is enrolled. And the question was, Whether it was a good Bar of the Remainder? And the Lord Chief Justice *Hobart* was of opinion, That it was no barre of the Remainder, because before enrollment nothing passed but only by way of conclusion. And the Bargainee was no Lawfull Tenant to the Precipe.

Mich. 11. Jacobi, in the Common Pleas.

315 WHEELER'S Case.

IT was moved for a Prohibition upon the Statute of 5. & 6. for working upon Holy days; and the Case was, That a man was presented in the spirituall Court for working, viz. carriage of Hay, upon the feast day of Saint *John* the Baptist, when the Minister preached and read divine service; and it was holden by the whole Court of Common Pleas, That the same was out of the Statute by the words of the Act it self, because it was for necessity; And the Book of 19 *H. 6.* was vouched, That the Church hath authority to appoint Holy days, and therefore if such days be broken in not keeping of them Holy, that the Church may punish the breakers thereof; But yet the Court said, That this day, viz. the Feast day of *St John* the Baptist was a Holy day by Act of Parliament, and therefore it doth belong unto the Judges of the Law, whether the same be broken by doing of such work upon that day, or not. And a Prohibition was awarded.

Mich.

Mich. 11 Jacobi, in the Common Pleas.

316 REARSBY and CUFFER's Case.

IT was moved for a Prohibition to the Court of Requests, because that a man sued there by English Bill for money which he had layd out for an Infant within age for his Meat, drink & necessary apparel; and set forth by his Bill that the Infant being within age, did promise him to pay the same. And a Prohibition was awarded, because as it was said, he might have an action of Debt at the common Law, upon the contract for the same, because they were things for his necessary livelihood and maintenance. And it was agreed by the Court, That if an Infant be bounden in an Obligation for things necessary within age, the same is not good, but voidable. *Quare*, for a difference is commonly taken, When the *Assumpsit* is made within age, and when he comes to full age. For if he make a promise when he cometh of full age, or enters into an Obligation for necessities which he had when he was within age, the Law is now taken to be, that the same shall binde him. But see 44. *Eliz. Randal's Case*, adjudged, That an Obligation with a penaltie for money borrowed within age, is absolutely void.

Mich. 11. Jacobi, in the Common Pleas.

317 SMITH's Case.

Smith, one of the Officers of the Court of Admiralty, was committed by the Court of Common Pleas to the prison of the *Fleet*, because he had made Return of a Writ, contrary to what he had said in the same Court the day before: and 11. *H. 6.* was vouched by *Warburton* Justice, That if the Sheriff do return that one is *languidus in prisona*, whereas in truth he is not *languidus*, the Sheriff shall be sued for his false Return: which was agreed by the whole Court. *Quod nota.*

Mich. 11. Jacobi, in the Common Pleas.

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W*Arburton* Justice asked the Pronothories this question, If in Trespas the plaintiff might discontinue his action within the yeer? To which the Pronothories answered, That if it be before any plea be pleaded, that he might: But the Justices were of a contrary opinion, that he could not; because then costs which are given by the Statute should be lost.

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Mich. 11. Jacobi, In the Common Pleas.

319 LAISTON'S Case.

IN Trespafs for a Way, the Defendant pleaded a plea in bar which was insufficient; and afterwards the plaintiff was Non-suit; yet it was resolved by the Court, that the defendant should have his costs against the plaintiff. But if a default be in the original Writ; and afterwards the plaintiff is Non-suit there, the defendant shall not have costs; because that when the Original is abated, it is as if no suit had been. And so was the opinion of the whole Court.

Mich. 11. Iacobi, in the Common Pleas.

320 HILL and GRUBHAM'S Case.

THe Case was this. A Lease was made unto Grubham by a deed paroll, *Habendum* to him, his wife, and his daughter *successive*, *sicut scribuntur et nominantur in ordine*: Afterwards Grubham dyed, and then his wife dyed; And if it were a good estate in Remainder to his daughter, was the Question. *Harris* Serjeant, The Remainder is void, and not good by way of Remainder for the incertainty. *C. 1. part in Corbets case*. In all Contracts and bargains there ought to be certainty. And therefore 22. *H. 6. is*, That if a Feoffment be made to two *et heredibus*, it is void, although it be with warranty to them and their heirs. *Vide 9. H. 6. 35.* Where *renunciavit totam communiam* doth not amount unto a Release, because it is not shewed to whom the Release is: and so in 29. *Eliz.* in the Kings Bench, in *Windsmere & Hulbards case*. Where an Indenture was to one, *Habendum* to him and to his wife, and to a third person *Successive*, it was holden that it was void by way of Remainder to any of them. And there it was Resolved, 1. That they did not take presently. 2. That they could not take by way of Remainder: And 3. that They could not take as Occupants, because that the intent of the Lessor was, that they should take but as one estate. But the Court was of opinion against *Harris*; And Resolved, That the daughter had a good estate in Remainder, and that the same did not differ from the Case in *Dyer*, Where a Lease was made by Indenture to one, *Habendum* to him & to another *successive*, *sicut nominantur in Charta*, for that those words *Sicut nominantur in Charta*, maketh the estate to be certain enough. And so they said in this Case, *Sicut scribuntur et nominantur in Ordine*, is certain enough, and shall be taken to be *Sicut scribuntur et nominantur in eadem charta*. But they agreed according to the Case in *Brooks Cases*, That a Lease to three, *Habendum successive*, is not good.

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Mich. 11. Jacobi, in the Common-Pleas.

321.

TRAHERNS Case.

AN Assize of Nufans was brought against the Defendant, because that *Levavit quandam domum ad nocumentum, &c.* And the Plaintiff shewed how that he had a Windmil, and that the Defendant had built the said house, so as it hindred his Mill: And the Jury found that the Defendant *levavit domum*; and that but two feet of it did hinder the Plaintiffs Mill, and is *ad nocumentum*. And how Judgment should be given, was the question. And the Court was of opinion, That Judgment should be, that but part of the house should be abated, *viz.* That which was found to be *ad nocumentum*. And it was said by some, That the Assize is such a Writ which extends to the whole house; and therefore that the whole house should be abated according to the Writ. But a difference was taken betwixt the words *Erexit* and *Levavit*: For, *Erexit* is but when parcel of a house is set up *ad nocumentum*; but *Levavit* is when an entire house is levied from the ground. And it was said by Hobart Chief Justice, That if the Defendant had not levied the house so high by two yards, it had been no Nufans: for the Jury find, that the two yards only are *ad nocumentum*. And therefore he conceived that the Writ was answered well enough; and that but part of the house should be abated: For the Writ is, *Quod levavit quandam domum, &c.* And the Verdict is, *Quod levavit domum*; But that but two yards of it is *ad nocumentum*: And therefore he said, the Writ is answered well enough; and that the Judgment should be given, That that only should be abated which was *ad nocumentum, &c.* *Quere*; For the Case was not resolved: And *vid.* Batten & Sympons Case, C. par. 9. to this purpose.

Mich. 11. Jacobi, in the Common-Pleas.

322.

BAGNALL and POTS Case.

IT was resolved by the Court in this Case, That when an Issue is joyned upon *Non concessit*, that the Issue shall be tryed where the Land is: But if a Lease be in question, and *Non concessit* be pleaded to it, it shall be tryed where the Lease was made. 2. It was resolved, That if Copyhold land be given to superstitious uses; and the same cometh unto the King by the Statute; That the Copyhold is destroyed, and the Uses shall be accompted void: But it was resolved, That in such Case by the Statute which giveth this Land so given to superstitious uses to the King, that the King hath not thereby gained the Freehold of the Copyhold; but that the same remaineth in the Lord of the Manoir.

*Mich. 11. Jacobi, in the Common-Pleas.*324. *JUCKS & Sir CHARLS CAVENDISH's Case.*

A Parson sued for the substruction of Predial Tythes, upon the Statute of 2 E. 6. in the Spiritual Court. The Defendant made his suggestion, That for such a Farm upon which the Tythes did arise, there was this custom; That when the Tythes of the Lands were set forth, that the Owners of the said Lands had used time out of mind to take back thirty sheafs of the Tythe-corn: and shewed that he was the Owner of the said Farm; and that according to the said custom, after the Tythes were set forth, that he did take back thirty sheafs thereof, and thereupon prayed a Prohibition. And in this Case it was said by the Court, That it ought to be averred, that the Farm was a great Farm, for otherwise it should be the impoverishing of the Church, and would take away a great part of the profit of the Parson. And it was further said by the Court, That if there were but thirty Tythe-sheafs in all, that the Owner should not have them, for then the Custom should be unreasonable: And Day was given to the other side, to shew Cause why the Prohibition should not be awarded.

*Mich. 11. Jacobi, in the Common-Pleas.*325. *CANDEN and SYMMON's Case.*

NOte, That where a Juror is not challenged by one party, who had sufficient cause of challenge; and afterwards is challenged by the other side, and afterwards the party doth release his challenge; in that case, the first party cannot challenge the same Juror again, because he did forego his time of challenge, and he had admitted the party for to be indifferent at the first.

*Mich. 11. Jacobi, in the Common-Pleas.*326. *The Bishop of CHICHESTER and STROD-WICK's Case.*

IN an Action of Trespas for taking away of Timber; and the Boughs of Trees felled: The Defendant, as to the Timber, pleaded *Not guilty*; And as to the Boughs, he made a special Justification, That there is a Custom within the Mannor of *Ashenbury* in the County of *Sussex*, That when the Lord fells or fells Timber-trees, that the Lord is to have only the

the Timber, and that the poor Tenants in *Coscagio parte Manerii*, time out of mind have used to have the Branches of the Trees for necessary Estovers to be burnt in *necessario focali in terris & tenementis*. And the Opinion of the Court was, That the Custom was not well expressed, to have Estovers to burn in *terris & tenementis*; for that Estovers cannot be appertaining to Lands, but to Houses only: And therefore whereas the Defendant in the Case did entitle himself to a house and lands, and gave in Evidence that the Custom did extend to Lands, it was holden that the Evidence did not maintain the Issue; And the Custom was alleadged to be, That the Lord should have *Quicquid valeret ad maremium*, and that the Freeholders should have *ramillos*. Which as *Hobart*. Chief Justice said, is to be meant all the Arms and Boughs; for whatsoever is not *maremium*, is *ramillum*. 2. It was holden in this Case, That the Non-use or Negligence in not taking of the Boughs, did not extinguish nor take away the Custom, as it hath been oftentimes resolved in the like case. And note that in this Case, to confirm the said Custom, the Book-case was cited, which is in 14.E.3. *Fitz. r. Bar.* 277. and the same was given in and avowed for good Evidence: where the Case was, That the Bishop of C. (which shall be intended the Bishop of *Chichester*) brought an Action of Trespass for felling of Trees, and carrying them away: where the Defendant pleaded, That he held a Messuage and a Verge of Land of the Bishop; and that all the Tenants of the Bishop within the Manor of A. ought to have all the Windfals of Trees, and all the Boughs and Branches, &c. Which Case, as *Harris* Serjeant conceived, was the Case of the very Mannor now in question; and the Tenant there (as in this Case) made a special Justification, and there it was holden that it was good, and adjudged for the Defendant: Also in that Case it was adjudged, That the Lord should have *Maremium*, and that the Tenants should have *Residuum*, which shall be intended the Boughs and Branches. And the Custom in the Case was adjudged good. But because the Defendant alleadged the Custom to be, to have the same as Estovers to be burned in *terris*, and gave Evidence only to the Messuage, it was found against the Defendant, for that the Evidence did not maintain the Issue.

Mich. 11. Jacobi, in the Common-Pleas.

327.

VAUGHAN'S Case.

IN a *Formedon* in the Discender, the Tenant had been effoined upon the Summons, and also upon the View. And after was pleaded *Ne dona pas*, the general issue; and thereupon issue was joyned: And if he might be effoined again after issue joyned, was the Question: And the

Court was of opinion, That in a real action the Tenant may be effoined after Issue joyned, but not in a personal action, by the Statute of *Marlebridge*. And *Hobart* Chief Justice said. That the Statute of *Marlebridge* gave not any Effoin, but only did restrain Effoins: and therefore in real Actions the same is left as it was at the Common Law; and by the Common Law the Tenant might be Effoined after Issue joyned. And note, *per totam Curiam*, That if an Effoin be not taken the first day, it shall never after be taken.

Mich. 11. Iacobi, in the Common-Pleas.

328.

CLAY and BARNETS Case.

IN an *Ejectione Firme*, the Case was this. Sir *Godfrey Foliamb* had issue *James* his son, who had issue *Francis*: And Sir *Godfrey Foliamb* was seized in Fee of divers Lands as well by purchase as by descent, in sundry Towns, viz. *Chesterfield, Brampton, &c.* in the Tenures of *A.B.C. &c.* and dyed. *James Foliamb* his son, 7 E. 6. made a Conveyance of divers Lands to *Francis Foliamb* being his younger son, *in hac verba*, viz. *Omnia mea Mesuagia, terras, & tentam in Chesterfield, Brampton, &c. modo in tenueri of the said A.B.C. qua pater meus Galfrid: Foliamb perquesivit* from divers men, whom he named in certain: And also convey a House called the *Hart* to the same *Francis*, which came to him by descent, by the same Conveyance which was in the occupation of one *Celie*, and not in the Tenures of the said *A.B.C.* And the great Question upon the whole Conveyance was, Whether all the Lands which he had by Descent in the said Towns, and in the Occupations and Tenures of the said *A. B. & C.* did pass, or only the purchased Lands. And it was resolved by the whole Court, That the Conveyance did pass only the Lands which he had by purchase, except only the said House which was precisely named and conveyed; and did not pass the Lands which he had by Descent. For if all the Lands which he had by Descent should pass by the general words, then the special words which passed the House which he had by Descent should be idle and frivolous; and that was one reason *ex visceribus cause*, that only the purchased Lands did pass. 2. It was said by Justice *Warburton*, That if a man giveth all his Lands in *D.* in the Tenures of *A. & B.* and he hath Lands in *D.* but not in their Tenures, that in that case all his Lands in *D.* passeth: So if a man give all his Lands in *D.* which he had by Descent, from his son, there all his Lands whatsoever shall pass. *Hobart* acc^d and said, That if a man gives all his Lands in the County of *Kent*, if he have Lands within the County, they do pass. And he said, that in a Conveyance every restriction hath his proper operation; and in the Conveyance in the principal case there were three restrictions: 1. All his lands.

lands in such Towns, viz. *Chesterfield, Brampton, &c.* 2. All his lands in the Tenures of such men, viz. *A.B.C.* 3. All his lands which he had by Purchase, &c. And the words (*All my Lands*) are to be intended all those my Lands which are within the restrictions. And he said, that the word (*Et*) being in the copulative, was not material; for all was but one sentence, and it did not make several sentences and the word *Et* is but the conclusion of the sentence. 3. They resolved, That general words in a Grant may be overthrown by words restrictive; as is 2 *E.* 4. and *Flow. Com. Hill & Granges Case*. And therefore if a man giveth all his lands in *D.* which he hath by Discent from his Father; if he have no lands by Discent from his Father, nothing passeth. 4. They agreed, That a Restriction may be in a special Grant, as in *C.* 4. par. *Ognels Case*: but they said, that if the Restriction doth not concur and meet with the Grant, that then the Restriction is void. Note, the principal Case was adjudged according to these Resolutions.

Mich. 11. Iacobi, in the Common-Pleas.

329. COOPER and ANDREWS Case.

TO have a Prohibition to the Spiritual Court, suggestion was made, That the Lord *De la Ware* was seised of 140 Acres of lands in the County of *Sussex*, which were parcel of a Park. And a *Modus Decimandi* by Prescription was said to be, That the Tenants of the said 140 Acres for the time being had used to pay for the tythes of the said 140 Acres two shillings in money, and a shoulder of every third Deer which was killed in the same Park, in consideration of all tythes of the said Park: And it was shewed, how that the Lord *De la Ware* had enfeoffed one *Cumber* of the said 140 acres of land; who bargained and sold the said 140 acres of land to the Plaintiffe who prayed the Prohibition. The Defendant said, that the said Park is disparked, and that the same is now converted into arable lands and pasture-grounds, and so demanded tythes in kind; upon which the Plaintiffe in the Prohibition did demur. *Hutton Serjeant*. By the disparking of the Park, the Prescription is not gone nor extinct; because the Prescription is said to be to 140 acres of lands, and not to the Park: and although the shoulder of the Deer, being but casual and at the pleasure of the party, be gone, yet the same shall not make void the Prescription. 2. He said, that the act of the party shall not destroy the Prescription: and although it be not a Park now in form and reputation, yet in Law the same still remains a Park. And he compared the Case unto *Lutterels Case*, *C. 4. par. 48.* where a Prescription was to Fulling-Mills, and afterwards the Mills were converted to Corn-Mills, yet the Prescription remained. 3. He said, Admit it is not now a Park, yet there:

there is a possibility that it may be a Park again, and that Deer may be killed there again. For the Disparking in the principal Case is only alleged to be, that the Pale is thrown down; which may be amended: For although that all the Park-pale, or parcel of it be cast down, yet the same doth still remain in Law a Park: and a Park is but a Liberty; and the not using of a Liberty doth not determine it, nor any Prescription which goes with it. And if a man have Estovers in a Wood by Prescription, if the Lord selleth down all the Wood, yet the right of Estovers doth remain; and the Owner shall have an Assise for the Estovers, or an Action upon the Case. *Vid. C. 5. par. 78. in Grayes Case*, the Case vouched by *Popham*. Further he said, That in the beginning a *Modus Decimandi* did commence by Temporal act, and Spiritual; and the mony is now the tythe, for which the Parson may sue in the Spiritual Court: And a Case *Mich. 5. Jacobi* was vouched, where a Prescription to pay a Buck or a Doe in consideration of all Tythes, was adjudged to be a good Prescription. And the Case *Mich. 6. Jacobi*, of *Skipton-Park*, was remembered: where the difference was taken, when the Prescription runs to Land, and when to a Park. In the one case, although the Park be disparked, the Prescription doth remain; in the other not. And *6 E. 6. Dyer 71.* was vouched: That although the Park be disparked, yet the Fee doth remain. And so in the Case at Bar, although the casual profit be gone, yet the certain profit, which is the two shillings, doth remain. *Harris* Serjeant contrary. And he said, that the Conveyance was executory, and the Agreement executory, and not like unto a Conveyance or Agreement executed: And said, that Tythes are due *jure divino*; and that the party should not take advantage of his own wrong, but that now the Parson should have the tythes in kind. And upon the difference of Executory and Executed, he vouched many Authorities, *viz. 16 Eliz. Dyer 335. Calthrops Case, 15 E. 4. 3. 5 E. 4. 7. & 32 E. 3. Anuitie 245.* And in this case he said, that the Parson hath no remedy for the shoulder of the Deer; and therefore he prayed a Consultation. *Hobart* Chief Justice said, That the Pleading was too short, and it was not sufficiently pleaded: For it is not pleaded, That the Park is so disparked, that all the benefit thereof is lost. But he agreed it, That if a man doth pull down his Park-pale, that the same is a disparking without any seisure of the Liberty into the Kings hands, by a *Quo Warranto*. But yet all the Court agreed, That it doth yet remain a Park in habit: And they were all also of opinion That the disparking the Park of the Deer, was not any disparking of the Park as to take away the Prescription. The Case was adjourned till another day. *this is more fully answered by Hubbard*

Mich.

Mich. 11. Jacobi, in the Common-Pleas.

330. PIGGOT and PIGGOT's Case.

IN a Writ of Right, the Donee in tail did joyn the Mife upon the meer Right; and final Judgment was given against the Donee, in which case the Gift in tail was given in Evidence. Afterwards the Donee in tail brought a Formedon in the Discender: and it was adjudged by the whole Court, that the Writ would not lie: For when final Judgment is given against the Donee in tail upon issue joyned upon the meer Right, it is as strong against him as a Fine with Proclamations: and the Court did agree, That after a year and day, where final Judgment is given, the party is barred; and also that such final Judgment should bar the Issue in tail.

Mich. 11 Jacobi, in the Exchequer-Chamber.

331.

AN action upon the Case was brought for speaking these words: *Thou doest lead a life in manner of a Rogue: I doubt not but to see thee hanged for striking Mr. Sydenhams man who was murdered.* And it was resolved by all the Justices in the Exchequer-Chamber, That the words were not actionable. At the same day in the same Court, a Judgment was reversed in the Exchequer-Chamber, because the words were not actionable: The words were these, *viz. Thou usest me now, as thy Wife did when she stole my goods.*

Mich. 11. Jacobi, in the Common-Pleas.

332. ROES and GLOVE's Case.

AN action of Debt was brought upon a Bond in *Mich. Term 9 Jac.* and in *Hillary Term* after the parties were at issue upon the Statute of Usurie; and it was found against the Defendant. Afterwards *Ter. Trin.* a Writ of Error was brought returnable *Mich. 10. Jacobi*, in which Term no Errors were assigned. And afterwards in *Hillary Term* following two Errors were assigned: the one, That there was no such Statute as the Statute of 37 H.8. of Usurie, which was against what he had before confessed by his Plea; the second Error was, That whereas *J. S. of Exeter* was returned of the Jury, it was assigned for Error, that *J. S. of another place*

place was sworn upon the Inquest: and in this Case the Court advised the Defendant in the Writ of Error to plead *In nullo erratum est*. By which the Court did seem to incline, that they were no Errors.

Mich. 11. Jacobi, in the Common-Pleas.

333.

BRADLEY and JONES Case.

IN an action upon the Case, the case was, That the Defendant did exhibite Articles against the Plaintiff in the Chancery before Dr. Cary, and there swore the Articles; and afterwards he sued in the Kings Bench, and had Process out of that Court upon the Articles sworn in Chancery: and for this an action upon the Case was brought, and it was adjudged that the action would lie. The articles exhibited in the Chancery were, That the Plaintiff being an Attorney at Law, was a Mainteinor of Juries and Causes, and a Barretor: and the Defendant prayed the Peace against him in the Kings Bench. And in this Case it was resolved, 1. That a man might pray the Peace or Good Behaviour of any other man in any of the Kings Courts: but then it must be done in due form of Law: and if he do it so, no action upon the Case will lie, as it was resolved 27 *Elix. in Cutler and Dixons* case in the Kings Bench. But it was agreed, that if a man sueth in a Court which hath not jurisdiction of the Cause, an action upon the Case will lie, but not where the Court hath jurisdiction of the Cause. 2. It was resolved, That the action did lie in the Case at Bar, because he did exhibite the articles in Chancery, and did not pursue them there: For when he had sworn the articles in the Chancery, he could not have a *Supplicavit* out of the Kings Bench; and the Oath and *Affidavit* in the Chancery doth remain as a Scandal upon Record. And *Hobart* Chief Justice said, That every Court ought to intermeddle with their own proper causes; and that two Courts are not to joyn in one punishment, for punishment is not to be by parcels. And he said, That if a man claimeth right to the Land of another, he is not punishable for it; but if he make title vnto a Stranger, then he shall be punished: for every one ought to meddle with his own business. 3. It was resolved, That when a thing doth concern the Commonwealth, the same doth concern every one in particular. And so it is lawful for any man to require the Good behaviour of another, for the publique good: *Interest etenim reipublica ut maleficia punientur*. 4. It was resolved, that the action did lie; because the Defendant made the articles in Chancery but a colour of the Good Behaviour: and although that the Kings Bench might grant the Good Behaviour without any articles preferred, yet when first they begin in another Court, they ought to follow the cause there. And *Hobart* the Chief Justice, in this case said, that an Attorney may not labour Jurors in the behalf of his Client, for that is Imbracery.

Mich.

Mich. 11. Jacobi, in the Common-Pleas.

334. FIAL and VARIER's Case.

IN an Action upon the Case, upon an *Assumpsit*, the Case was this. A man did promise to stand to the Arbitrement of *J.S.* & *J.D.* if they made their Arbitrement and Award within ten dayes: and if they do not make their Award within ten dayes, that if they nominate an Umpier, and he make an Award within the said ten dayes, that then, &c. *J.S.* & *J.D.* did not make any Award within ten dayes: but the fourth day after the Submission they did nominate *J.N.* to be Umpier, who made an Award within the said ten dayes; and the Defendant would not perform the Award, wherefore the Plaintiffe brought the action: *Sherley* Serjeant. It is repugnant: For the first Arbitrators had the whole ten dayes to make their Award, and then cannot the Umpier make an Award within the said ten dayes. But the opinion of the whole Court was, that the action would lie; and that it should be construed thus, *viz.* That if an arbitrement and award be made within ten dayes by the first Arbitrators or by the Umpier: For the first Arbitrators may examine the matter for two or three dayes; and if they cannot make any award, then the Umpier shall have the rest of the ten dayes to make the award: and so it was adjudged.

Mich. 11. Jacobi, in the Common-Pleas.

335. COLT and GILBERT's Case.

AN action upon the Case brought for these words, *He is a Thief, and stole a Tree*: adjudged that the action would lie; for the later words do not extenuate the former: But, *Thou art a Thief, for thou hast robbed my Orchard*, are not actionable, *v.C.4 par. Bretridges Case.*

Mich. 11. Jacobi, in the Common-Pleas.

336. BROOK's Case.

AN action upon the Case was brought for words. The Plaintiffe set forth in his Declaration, That he was a Mercer by his trade, and did sell wares and commodities in his shop, and did keep divers Books of his trade, and Debt-books: and that the Defendant said unto Mr. *Palmer*, being the Plaintiffs Father-in-Law, these words of the Plaintiffe, *viz.*

Your Son-in-Law Brooks deceived me in a Reckoning; and he keepeth in his shop a false Debt-book. And I will shame him in his Calling. *Nichols* Justice, and *Hobart* Chief Justice were of opinion, that the action would not lie for those words: 1. Because the words single of themselves are not any slander; and when words will bear an action, it ought to be out of the force and strength of the words themselves. 2. The first words, *Thou hast deceived me in a Reckoning* will bear no action, because it is impossible but that Tradesmen and Merchants which keep Debt-books will sometimes mistake one Figure for another, and so the same doth turn to the prejudice and damage of another against the will of the party himself. And so the subsequent words, *He keepeth a false Debt-book*, are not actionable, because it may be falsified by the Servants of the party, and not by the Defendant himself; and also it may be false written. *Et interest reipublica ut sit finis litium*; and it should be a cause of many Suits, if such a nice construction should be made of words as to make them actionable; and words shall be taken in *mitiori sensu*, if there be no particular description and declaration that the words were spoken maliciously. And therefore general words which of themselves are actionable, by construction shall be taken to bear no action; as C.4. par. *Stanhops* case. And so if a man saith of another, that he hath the Pox, they shall be taken in *mitiori sensu*, because they are not described by any subsequent words which declares malice in the party. And *Nichols* vouched a Case which was in this Court this Term, where an action was brought for these words; *Thou ushest me now, as thy Wife did when she stole my Cushions*: that the words were not actionable. *Warburton* Justice. When words are spoken which scandal a man in his trade or profession, they are actionable: as if one say of an Attorney, *Thou cosenest Mr. Winsor of his Fees*: and so if words are spoken maliciously. And therefore an action was brought by one who was a Jury-man, for these words, viz. *Thou hast deceived me and my children of eight hundred pounds*; they were adjudged actionable. And so *Hill. 6. Jacobi. res. 1159*. *Thou art a Jury-man, and hast been the death of a hundred men by thy false means*: Being maliciously spoken, (although in themselves they are not actionable) yet they will bear an action. But it was adjudged in the principal Case, for the reasons given by the two other Justices, that the words would bear no action; to which *Warburton* Justice in the end did seem to agree.

*Hill. 11. Jacobi, in the Common-Pleas.*337. *AYLIFFE and BROWNS Case.*

A Woman who was possessed of a Term for divers years, had issue two Daughters; the one married to *Ayliffe*, and the other to *Brown*. *Ayliffe* had issue four Daughters, and *Brown* had also issue; and the Woman did demise Legacies to the children of *Ayliffe* out of the Rent reserved upon the Lease, and made *Brown* her Executor, and dyed. *Ayliffe* required *Brown* in the behalf of his children to pay the money to him, that he might employ the same for the benefit of the children: which he refused to do, and thereupon he sued him in the Spiritual Court, and there Sentence was given for the Plaintiffe. *Brown* the Executor moved for a Prohibition, and alleadged for ground of it, that he was Executor, and chargeable in an accompt for the money. But because he came after sentence, and also after he had appealed to the Court of Delegates, and after a sentence given there also against him, the Court refused to grant a Prohibition in the Cause; and also because he did refuse to give security for the payment of the Legacies to the children.

*Hill. 11. Jacobi, in the Common-Pleas.*338. *WORMLEIGHTON and HUNTERS Case.*

Two men are bounden with *J.S.* as Sureties in an Obligation. One of the Sureties, viz. *Wormleighton*, was sued upon the Bond, and the whole penalty recovered against him. He exhibited an English Bill into the Court of Requests against the Defendant, being the other Surety, to have contribution: and it was moved to the Court for a Prohibition to the Court of Requests, and the same was granted, because by entring into the Obligation it became the debt of each of them jointly and severally, and the Obligee had his election to sue which of them he pleased and take forth Execution against him: and the Court said, That if one Surety should have contribution against the other, it would be a great cause of suits, and therefore the Prohibition was awarded; and so it was said it was lately adjudged and granted in the like case, in *Sir William Whorwoods* case.

Hill. 11. Jacobi, in the Common-Pleas.

339.

LAMBERTS *Case.*

TWO men were Partners in goods: the one of the Partners sold unto 7. S. at several times goods to the value of 100 l. and for the goods at one time bought he paid the money according to the time, afterwards an action was brought by one of the Partners for the rest of the money, and the Plaintiff declared upon one contract for the whole goods, whereas in truth they were sold upon several contracts made, and the Defendant in that case would have waged his Law: But the Court advised the Plaintiff to be Non-suit, and to bring a new action, because that action was not well brought, for it ought to have been a several action upon the several contract. And in this case it was agreed by the Court, that the sale of one Partner is the sale of them both; and therefore although that one of them selleth the goods, or merchandizeth with them, yet the action must be brought in both their names; and in such case the Defendant shall not be received to wage his Law, that the other Partner did not sell the goods unto him, as is supposed in the Declaration.

Hill. 11. Jacobi, in the Common-Pleas.

340.

WHITE and MOORS *Case.*

A Man did recover in an action of Debt brought in the Common-Pleas, and had Judgment; and afterwards before Execution was taken forth, the Defendant in the Debt exhibited an English Bill into the Court of Requests to overthrow the Judgment and to stay Execution, pretending in his Bill that there was a parol agreement betwixt him and the other, that he should not be charged with that Judgment nor the payment of the money. It was moved for a Prohibition in this case, which was granted by the Court, because the Plaintiffe there by practice did endeavour to subvert a Judgment given at the Common-Law. And in speaking of this Case, the Court did very much condemn the course used in the Court of Requests in taking Bonds of the parties to perform their Decrees made there; for it was said that such Bonds were against Law, and so it had been oftentimes adjudged.

Hill.

Hill. & I. Jacobi, in the Common-Pleas.

341. BALDWIN and GIRRIES Case.

A Parson did Libel in the Spiritual Court for Tythes, and the substra-
 ction of them; and grounded his Libel upon the Statute of 2 E. 6.
 The Defendant alleged that he was to be discharged from the payment
 of tythes, by reason of priviledge within the Statute of 31 H. 8. of Dissol-
 utions: and the Plaintiffe here had a Prohibition. And afterwards they
 were at issue here, Whether he ought to be discharged by Priviledge or
 not; and after issue joyned, the Plaintiffe in the Prohibition was Non-
 suite: And thereupon the Parson had a Consultation, and proceeded in
 the Spiritual Court, and there obtained a sentence; and the sentence
 there was, That he should recover the single damages, and the same was
 set in certain; and *ulteriorius* that *recuperet duplicem valorem*, which was
 also by the said sentence set in certain. And it was resolved in that Case
 by the whole Court, That a Prohibition should be granted grounded
 upon the sentence, because the Spiritual Court in their sentence did ex-
 ceed the damages which was to be given by the Statute in that Court:
 and it was said, That although the sentence there given be not expressly
 that he recover treble damages, yet because it did amount to so much, if
 the words of the sentence be joyned together, It was directed that a spe-
 cial Prohibition, in which the Statute and the whole matter is to be men-
 tioned, be awarded. And in this case it was agreed by the whole Court,
 That the Statute of 2 E. 6. for substrauction of Tythes meerly, doth not
 give any damages: but if the Tythe be first set forth, and then they are
 substracted, there because the Parson had once an interest in them, he
 shall recover treble damages. And the principal Case was resembled by
Warburton Justice to the case of Waste; that if the Jury give damages
 20^l. there the Court shall treble the damages and make the same 60^l.
 and so it was done in the principal case.

Hill. & I. Jacobi, in the Common-Pleas.

342. GIPPE'S Case.

A Man Libelled for Tythes in the Spiritual Court: the Defendant
 alleged a *Modum Decimandi*, and thereupon had a Prohibition;

and afterwards the Plaintiffe in the Prohibition did not prove his suggestion within six months: and therefore the Court granted a Consultation, because the Law hath appointed a certain time within which time the suggestion is to be proved, Otherwise the Parson should be delayed and prejudiced in his Tythes; and so it was adjudged in Parson *Bugs-case*, Mich. 8. Jacobi, in this Court.

Hill. 11 Jacobi, in the Kings Bench.

343. CROSSE and STANHOP'S Case.

A N action of false Imprisonment was brought against the Defendant and two other Justices of Peate of the County of York. The Defendants justified the Imprisonment, by reason of the Statute of 1 *M. cap.* That it should not be lawful for any maliciously and contumeliously to molest or disquiet any person or persons which are Preachers, or after should be Preachers. And the Plaintiffe demurred upon the Plea in Bar generally; and two Exceptions were taken to the Pleading: 1. Because the words of the Statute were misrecited; for the words of the Statute are in the disjunctive, *maliciously or contumeliously*: And the opinion of the Court was, that when the precedent & subsequent words disjunctive are all of one sense, that the word (*Or*) is all one with the copulative; but where they are of divers natures (as by word or deed) it is otherwise. The second Exception was, That where the words were (by the greater part of the Justices) the Recital was (by the better part of the Justices.) But notwithstanding these Exceptions, it was adjudged against the Plaintiffe.

Pasch. 12 Iacobi, in the Kings Bench.

344. CARTWRIGHT'S Case.

C Artwright prayed a Prohibition; and the Case was this. *A.* lying sick upon his bed, made his Will; and afterwards said unto his Executors named in the Will, *I will, that B. shall have twenty pounds more, if you can spare it.* And the Executor answered and said, *Yes forsooth*: but no Codicil was made of the same Legacie. And a Bill was preferred in the Spiritual Court for the Legacie: whereupon the Executor prayed a Prohibition. And it was holden by this Court, that although this Court

Court hath not power to hold plea of the thing labelled for there in the Spiritual Court, yet it hath power to limit the Jurisdictions of other Courts; and if they abuse their authority, to grant a Prohibition. *Vid.* 2 H. 4. 10. But it was doubted whether the Spiritual Court, as this case is, might give remedy to the person for the Legacie: For the same not being annexed to the Will by a Codicil, it was but *fidei commissum*: and so the doubt was, Whether the Spiritual Court might hold plea of it: For if they cannot hold plea of it, then in this case a Prohibition may be lawfully granted, although that this Court have not power nor jurisdiction of the thing it self. The Court would be advised of it, and therefore it was adjourned.

Pasch. 12 Jacobi, in the Kings Bench.

345. SIR CHRISTOPHER HEYDON'S CASE.

Godfoll, Shepard & Smith brought an Assise of *Novel disseisin* against Sir Christopher Heydon, which was tryed at the Assises in Norfolk before Sir Tho. Fleming Lord Chief Justice of England, and Justice Doderidge, which was found for the Plaintiffs, and Judgment was given for them in the Court of Common-Pleas. And thereupon Sir Christopher Heydon brought a Writ of Error in the Kings Bench; and assigned for Error, That whereas the Judgment was given upon his own Confession, the Judgment was entred, That the Plaintiffs did recover *per visum Recognitorum Assise predict.* And after argument in the Kings-Bench, it was adjudged by the whole Court, that the Judgment given in the Common-Pleas should be affirmed; notwithstanding the Error assigned. And now to reverse the Judgment given in the Kings Bench, he brought another Writ of Error in Parliament. Cook Chief Justice said, That the Clerks of the Chancery ought not to make a Writ of Error to the Parliament, unlesse they have the Kings licence so to do. And it was agreed by the whole Court, that a Writ of Error lieth in Parliament upon the Transcript of the Record, without bringing of the Record it self in Parliament: For the Parliament is holden at the Kings pleasure, and may be dissolved before the Errors be discussed; and so the Record it self cannot be brought here again; because the Parliament which is a higher Court was once possessed of it. 8 H. 5. Error 88. The same Law in Error upon a Judgment given in Ireland, 5 E. 2. Error 89. where only the Transcript of the Judgment is removed; For if the Record it self should be brought into England, it might be that before it came higher it shall be drowned in the sea; and it is dangerous to commit a Record to

to the mercy of the winds and sea. And Error lieth to reverse a Fine up on the Tenor of the Record : and it is not necessary to bring the Fine it self, because there is not any Chirographer in this Court to examine it. At another day the same Term, *George Crook* and *Noy* took five Exceptions to the said Writ of Error : the first was, Because the Writ doth recite the Judgment to be in *Affisa capta coram Tho. Fleming Capital. Justiciar. ad Placita*, & *Johannem Dodderidge milit. unum Justic. ad Placit. coram nobis tent.* And the Exception was, because that this latter addition was not to them both. *Dodderidge* Justice held, that the same was no good Exception to abate the Writ of Error, because the omission is only in the addition of Honour which is surplusage, and the Person is certain, and his power appears to take the Assise : and that Exception is not in point of jurisdiction, but of denoting of the person ; and therefore is like the Case in 19 *Eliz. Dyer*, 356. which is a stronger Case, and 6 *E. 5. Dyer* 77. *Haughton* and *Cook* contr. But *Crook* Justice did agree with *Dodderidge*, that the addition of the same was but surplusage, and that the Writ had been well enough without it. *Cook* Chief Justice held the contrary : For then he varieth from their Commission, which is their authority ; but if it had been left out in their Commission, then the Writ had been good enough. And he said, that when a man meddles with a thing which is but surplusage, which he needed not to do, he must recite the same substantially, otherwise his plea will be vitious. *Ci 4 par. Palmers case.* And when he maketh *Tho. Fleming Capit. Justic. ad Placita* indefinitely, he varieth from the truth : for the stile is, *Tho. Fleming Capit. Justic. ad Placita coram Rege tent.* *Haughton* Justice acc^t and he said, that in every Writ of Error which is to remove a Record three things ought to be expressed. 1. Mention is to be made before what person it was taken, as the book is in 28 *H. 6. 11.* 2. It is to mention betwix whom it was, 9 *H. 6. 4.* 3. The manner of the caption is to be mentioned, whether by Writ or without Writ, 2 *R. 3.* 2 & 3. and this Writ faileth in the first of them, therefore he concluded that the Writ should abate. *Cook* Chief Justice was of the same opinion, and agreed that Misnomer and variance are not to be favoured, if they be not substantial and essential, *qua dant esse rebud* : and he said that the variance in this case is of such nature ; For in many Records yet extant, and in the time of King *H. 3.* it is to be found, that the Chief Justice of England did sit and give Judgment in the Common-Pleas and in the Exchequer ; and so then *Capital. Justic. ad Placita* is too general, because he might sit and give Judgment in any of the said Courts. The second Exception was, because that the Writ saith, *Affisa capta*, &c. and doth not say *per breve*, nor *sine breve*, nor doth say *secundum legem & consuetudinem*, &c. For in 43 *Eliz.* in the Case betwix *Cromwell* and *Andrews*, it was adjudged not good to say, That such an Action came into the Common-Pleas out of the Country, and doth not shew that it came by adjournment, or by

Certiorari,

Certiorari, or *Mistimus*. To which it was answered by *Damport* Counsellor for the Plaintiff, that it is a strong intendment that the Assise was taken *per breve*, and therefore it needed not to be expressed, because it is a general, and not a special Assise. *Crook* Justice. The Exception is good; for it is so general, that it cannot be intended which Assise it was: For put case there were two Assises betwixt the same parties, it cannot be known which Assise is intended. And of the same opinion was *Haughton* Justice. *Dodderidge* contrary; and he said, Notwithstanding the Exception the Record ought to be removed by the Writ: For the Judges Conscience may be well satisfied which Record is to be removed; And here the Record which is to be removed is so precisely shewed, that no body can doubt of it which ought to be certified: And there are Records removed by Writs of Error which are more dubious then this is, v. 19 *Eliz. Dyer* 356. 20 *E.3.* But in this case the Writ is much enforced by the words *Sommon. & Capt.* For in every Assise there are four Commands to the Sheriffe. 1. *Facere tenementum esse in pace*, to quiet the possession. 2. *Facere recognitionem*, or *Recognit. videre sentam*. 3. *Summonens*. 4. *Ponas eos per vadios, &c.* For which cause of necessity it must be meant an Assise *per Breve*. The third Exception was, because in the Writ it was not shewed who was Plaintiffe, and who Defendant. *Dodderidge*. It is generally to be agreed, That the Writ of Error ought to agree with the Record: which Rule is taken in 3 *H.6. 6. C. 3. par.* the Marquess of *Winchesters* Case. But yet every Variance doth not abate this VVrit: For if the variance be only in matter of circumstance, as it is in this Case, the VVrit shall not abate. *vid. 9 H.6. 4 & 5 Phil. & Ma. Dyer* 164. 2 *Eliz. Dyer* 173. & 180. 28 *H.6. 11 & 12.* The fourth Exception was, because it doth not shew the place of the Caption of this Assise, but sayes generall in *Com. Norfolk*, *Haughton* held that rather to be examinable in the Parliament then here. The last Exception was, because the VVrit is directed to *Cook* Chief Justice, that he certifie the Record *sub sigillo suo*: whereas it was said the Record it self was to come in Parliament, and there a Transcript thereof is to be made, and the Record to be remanded. *V. 22 E.3. 23 Eliz. Dyer* 357. 1 *H.7. 29.* against the Book of Entries 302. To which it was answered, That it is at the pleasure of the Parliament to have either the one or the other, 22 *E.3. 8 H.5. Error* 88. To which *Cook* agreed. And note, that upon this VVrit of Error a *Superfedeas* was fraudulently procured, and a VVrit of Attachment issued forth against *Bacon* who procured it; And the *Superfedeas* was disallowed, because that another *Superfedeas* was granted in the first VVrit of Error, And a man can have but one *Superfedeas*. But the Question in this Case was, Admitting that the VVrit of Error be good and not abateable, If the same be a *Superfedeas* in it self? And the Court doubted of that point: For *Cook* Chief Justice said, That he had viewed 26 or 27 VVrits of Error which were brought

in Parliament, where the first Judgment was disaffirmed, and but one where the Judgment was affirmed; and that is in 23 *Eliz. Dyer* 357. the Record of which cannot be found: *Et quod in praxi est inusitatum, in iure est suspectum*. The Books where Error was brought in Parliament are 2 *E.3.34* & 40 in the old print. 22 *E.3.3.42 Aff. pl. 22. 9 H.5.23. 1 H.7.29. 23 Eliz. Dyer* 375. And it should be mischievous for delay, for a Parliament is only to be summoned at the Kings pleasure. *Haughton, Dodderidge* and *Crook* held clearly, That this VVrit of Error was a *Superfedeas* in it self, and that upon the Book of 8 *E.2. Error* 88. & 1 *H.7.19* where it is said, That the Justices did proceed to Execution after the Judgment affirmed in Parliament, and therefore *ex consequente sequitur* not before: And therefore the VVrit of Error is a *Superfedeas* that they cannot proceed. But there is no President of it in the Register, but a *Scire facias*, fo. 70. And the Court held, That if a *Superfedeas* be once granted and determined in default of the party himself, that he shall never have another *Superfedeas*: but otherwise if it fail by not coming of the Justices. Also *Cook* Chief Justice held, That by this VVrit of Error in Parliament Sir *Christopher Heydon* could not have the effect of his suit, because it is to reverse a Judgment *coram Rege*, and so the Judgment given in the Common-Pleas stands firm, and Sir *Christopher Heydon* is put to a new VVrit of Error in this Court: for the Judgment in the Kings Bench is, *Judicium affirmetur, & stet in pleno robore & effectum*: And it is not as the Judgment is in 20 *E.4.44. Judicium stet in aeternum*. And so that not being the fundamental Judgment, the Reversal thereof is but the beginning of another suit, 38 *H.6.3*. And admit that the VVrit of Error be a *Superfedeas* for the second Judgment, yet it is a Question whether it shall be for the first which is not touched by the VVrit: And whether they may grant Execution upon it or not. *Vide* 13 *E.4.4. 43 E.3.3. 8 H.7.20*. And therefore the Court advised Sir *Christopher Heydon* to sue unto the Kings Majesty by Petition to have a new Writ of Error, for without Petition he cannot have the Writ, 22 *E.3.1. 8 E.2. Error* 88. And the Justices gave him warning to do it in time convenient, otherwise they would award Execution if they did perceive the same to be meerly for delay, according to the Cases in 6 *H.7. & 8 H.7*. And afterwards the Parliament being upon a sudden dissolved without any thing done therein, Execution was awarded.

Pasch. 12 Iacobi, in the Kings Bench.

346. BLITHMAN and MARTIN'S Case.

Iohn Blithman brought an Action upon the Case against Martin upon an *Assumpsit*, and recovered. And it was moved, That because the Con-

Consideration which was the Cause of the Action was against Law, that the Judgment might be stayed. For the Plaintiff did alledge the same to be in consideration, That if the Plaintiff being Goaler of such a Prison in *Devonshire*, would deliver one who was in Execution for Debt, he promised to give him Twenty pounds: And he alleadged *in facto*, that he did deliver him, the Debt not being satisfied: And because the Consideration was to do a thing which was against the Law, the opinion of the Court was that it was void, and that the Plaintiff should not have Judgment.

Pasch. 12 Iacobi, in the Kings Bench.

347.

SHERLOE'S Case.

Sherloe brought an Action of Assault and Battery, and declared *Quod Scdm* the Defendant *verberavit*: And did not shew certain, nor alledge precisely in his Declaration, That the Defendant did beat him: Exception was taken unto it: For there is a difference betwixt a Declaration in an *Ejectione Firme*, Debt, and this Action; for in those Actions such Declaration is good, but not in this Action. And to prove the same, one *Sheriffe* and *Bridges Case* in 39 *Eliz.* was cited, where such Declaration was adjudged void. But yet the opinion of the Justices was, That the Declaration was good enough notwithstanding the said Judgment in 39 *Eliz.*

Pasch. 12 Iacobi, in the Kings Bench.

348.

GRUBB'S Case.

IT was moved in Arrest of Judgment upon issue joyned *inter Mathiam Grub*, and in the *Venire facias* he was called *Matheum Grub*. And Cook Chief Justice said, That the *Venire facias* was vitious: but because that the Jury did appear upon the *Habeas Corpora*, the Trial was well enough.

232 *Claydon and Sir Jerom Horsey's Case.*

Pasch. 12 Jacobi, in the Kings Bench.

349. *CROOK and AVERIN's Case.*

CROOK Merchant brought an Action upon the Case against *Averine* for speaking these words, viz. *Mr. Crook came into Cornwall with a blue Coat: but now he hath gotten much wealth by trading with Pirats, and by cosening by sale of Pilchers, and by Extortion.* And Cook Chief Justice said, That the Law giveth no favour to those verbal Actions, and we see there is not any such Action brought in our old Law-books. And therefore he said, Words ought to be certain: And he examined the words in this Case by themselves; and said, That the first words are not actionable, because they are not material; And the other words (*by trading with Pyrats*) are too general; for an honest man might trade with a Pyrate, not knowing him to be a Pyrate, and so no damage might come to him. But as to the other words he gave no opinion.

Pasch. 12 Jacobi, in the Kings Bench.

350. *CLAYDON & SIR JEROM HORSEY's Case.*

CLAYDON brought an Action upon the Case against *Sir Jerom Horsey* for erecting of a house in a certain place called *Risborough Common*: and alleaged in certain, That every one who had Common in *Risborough pred. &c.* and did not alleadge, That the Common is in the Mannor of *Risborough*: But he declared, That there is such a Custome within the Mannor of *Risborough*. And the opinion of the Court was, That the Declaration was good, because there is but one *Risborough* alleadged, and therefore of necessity it must be meant *de Manerio*.

Pasch. 12 Jacobi, in the Kings Bench.

351. *The CLOTHWORKERS of IPSWICH Case.*

THE Masters and Wardens of the Clothworkers of *Ipswich* in the County of *Suffolk*, brought an Action of Debt for 3*l.* 13*s.* 4*d.* against

against D. and declared, That the King who now is had incorporated them by the same name, &c. And had granted unto them by Charter, *Quod nullus exerceat artem sive occupationem in aliqua shoppa, domo sive camera infra villam predict.* of a Clothworker or Tailor, *nisi ante eos vel duos eorum probationem faceret quod Apprentic. fuit per spacium 7 annorum, & per eos sive duos eorum sit approbat. sub pena 3^l. 13^s. 4^d. pro qualibet septimana qua exerceat predict. artem contra hanc constitutionem.* And layed in fact, That the Defendant had used the Trade of a Tailor for the space, &c. against &c. The Defendant pleaded, That he was retained in service with one Mr. Pennel Gen: of Ipswich, and had been an Apprentice for the space of seven years in tali loco, &c. And that he made garments for his said Master and his wife and their children, *infra &c. qua quidem exercitio est eadem exercitio artis* which is supposed by the Plaintiffs in their Declaration. Upon which the Plaintiffs did demur in Law. Goldsmith for the Plaintiffs, That the Plea in Bar is void: For every Plea in Bar ought to confesse and avoid, traverse or deny that which is alleadged in the Plaintiffs Declaration: But this Plea in Bar had not done any of them, and therefore was void: For the exercising of the Trade which he hath confessed in his Bar, cannot be intended the same matter with which the Plaintiffs have charged him in their Declaration, and therefore it is no good bar at all: And to prove the same, *vide* 14 H.6.2. 35 H.6.53. 12 H.7.24. 27 H.8.2. Sir Robert Hicham for the Defendant: And he held that the matter is well confessed and avoided; because that usage which he hath confessed in the Bar is colourable the same usage with which the Plaintiffs have charged him in their Declaration. As in a Writ of Maintenance, the Defendant saith That he was of Council with the party, being a Serjeant at Law, &c. which is the same Maintenance which is supposed by the Plaintiffs: *vide* 28 H.6.7. & 12. 19 H.6.30. 18 E.4.2. 36 H.6.7. Also he said, When a Declaration is general, the Defendant need not traverse, 1 E.4. 9. 2 E.4. 28. And further he said, That the Statute of 27 Eliz. cap.5. of Demurs helped that defect, for that it is but only matter of form. But the Justices did not argue that point: But the Question which they made was, Whether the Constitution or Ordinance were lawful or not: And as to that it was holden by the whole Court, That the said Ordinance was unlawful: And it was agreed by the Court, That the King might make Corporations, and grant to them that they may make Ordinances for the ordering and government of any Trade; but thereby they cannot make a Monopoly, for that is to take away Free-trade, which is the birthright of every Subject. And therefore the Case was in 2 H. 5.5. in Debt upon a Bond upon Condition, That one should not use his Trade of a Dyer in the Town where the Plaintiffs did inhabit for one year: And there said, That the Obligation was void, because the Condition was against the Law; And he swore (by God) if the Plaintiffs were:

254 *The Clothworkers of Ipswich Case.*

were present, that he should go to prison till he had paid a Fine to the King: Yet regularly, *Modus & Conventio vincunt legem.* 2. It was resolved, That although such Clause was contained in the Kings Letters Patents, yet it was void: But where it is either by Prescription or by Custome confirmed by Parliament, there such an Ordinance may be good; *Quia Consuetudo Legalis plus valet quam Concessio Regalis.* The King granted unto the Abbot of *Whitby* the Custody of a Port which is as it were a Key of the Kingdom; and therefore the Grant was void and so adjudged: And such Grants are expressly against the Statute of 9 E 3. cap. 1. And the Charter granted by King *Henry* the 8. to the Physicians of *London* hath the same Clause in it: But if it had not been confirmed by Act of Parliament made 33 H. 8. it had been void. The King granted unto *B.* that none besides himself should make Ordnances for Battery in the time of war: Such Grant was adjudged void. But if a man hath brought in a new Invention and a new Trade within the Kingdom, in peril of his life and consumption of his estate or stock, &c. or if a man hath made a new Discovery of any thing, In such Cases the King of his grace and favour, in recompence of his costs and travail, may grant by Charter unto him, That he only shall use such a Trade or Traffique for a certain time, because at first the people of the Kingdom are ignorant, and have not the knowledge or skill to use it: But when that Patent is expired, the King cannot make a new Grant thereof: For when the Trade is become common, and others have been bound Apprentices in the same Trade, there is no reason that such should be forbidden to use it. And *Cook* Chief Justice put this Case: The King granted to *B.* That he solely should make and carry Kerries out of the Realm; and the Grant was adjudged void, which *Crook* conceisit. 3. It was resolved, That this Charter was void, because of the words, *viz. Nisi ante eos vel duos eorum probationem feceris, &c.* And therefore it was considered what proof should be sufficient for the party: And as to that it was agreed, That the proof cannot be upon Oath; for such a Corporation cannot admidister an Oath unto the party: And then the proof must be by his Indentures and Witnesses; and perhaps the Corporation will not allow of any of them: For which the party hath no remedy against the said Corporation, but by his Action at the Common Law; and in the mean time he should be barred of his Trade which is all his living and maintenance, and to which he had been Apprentice for seven years. Another reason was given, because that by this way they should be Judges in their own cause, which is against the Law; And the King cannot grant unto another to do a thing which is against the Law. And afterwards *Trin. 12 Jacobi*, Judgment was entred, *Quod Querentes nihil capiant per Billam.* And Judgment was then given for the Defendant.

Pasch. 12 Iacobi, in the Kings Bench.

352. LINSEY and ASHTON's Case.

Linsey brought an Action of Debt against Ashton upon a Bond, the Condition of which was to perform an Award. The Defendant said that the Award was, That the Defendant should surcease all suits depending betwixt them, which he had done: The Plaintiffe in his Replication said, That the Arbitrators made such Award *ut supra*, and also that the Defendant should pay unto the Plaintiffe 25^l. at the house of *J. S. absque hoc*, that they made the other Award only. Upon which the Defendant did rejoyne and said, That well and true it is that they made those Awards, &c. But they further awarded that the Plaintiffe should release unto the Defendant, which he had not done. And upon the Rejoynder the Plaintiffe did demur in Law. And the opinion of the Court was without question, That the Plea was a departure, 19 H.6.19. But it was argued by *Finch*, That the Replication was insufficient: For the Plaintiffe ought not to have traversed, as this Case is, because that a man ought not to traverse a thing alleadged by Implication, but ought to traverse that which is alleadged *de facto*, upon which there may be an issue joyned. And to prove the Traverse void, the Case in 11 H.6.50. was put: But the Exception was not allowed by the Court. Another Exception was taken, because the Award it self was void, because it was to do a thing upon the Land of another man, which he might not lawfully do: And although the Arbitrators might award him to do the thing which is inconvenient, yet they cannot award him to do a thing which is impossible and against the Law: as in 17 E.4.5. Two were bound to stand to the Arbitrement of *J. S.* of all Trespasses; who awarded that the one should pay unto the other 40^l. and that he find Sureties to be bounden for the payment of it. And by the opinion of the Justices the Award was void, because he could not award a man to do that which did not lie in his power, and he hath no means to compel the stranger to be bound for him. But the opinion of the whole Court was against *Finch*: For first, the mony is to be paid *apud domum J. S.* and not *in domo*; And it might be, for any thing that appeareth, that the said House is adjoyning to the High-way, so as every Stranger might lawfully come unto it, although he might not come into it without being a Trespassor: But admit it be not adjoyning to the High-way, yet he might come as neer unto the house as he could, or he might get leave to come thither. Secondly, It was resolved, That although

though the Award was void as to that part, yet for the residue it stood good, and therefore for not performance of the same the Bond is forfeited. As if *7.* be bounden to perform the Award of *7.S.* for White-Acre, and that he award that I enfeoffe another of White-Acre, and that he give unto me Ten pounds: If I tender unto him a Feoffment of White-Acre, and he refuseth it, and will not give to me the 10^l. I shall have an Action of Debt upon the Bond, as it is adjudged in *Osborn's Case C.10.par.131.* The same Law, If *7.S.* and *7.N.* submit themselves unto the Award of *7.D.* who awardeth that *7.S.* shall surcease all suits, and procure *7.N.* to be bounden with a stranger, and make a Feoffment of his Mannor of *D.* which is a thing out of the Submission: In that case there are three things enforcing the Arbitrement; the first is only good, the second is against the Law, and the other is out of the Submission: yet being in part good, it ought to be performed in that, otherwise the Bond is forfeited. But this Case was put: If *7.* be bounden to stand to the Award of *A.* *ita quod* it be made *de & super premissis*, and afterwards *A.* maketh an Award but of part of the premises, there it is void in all, because it is not according to the authority given unto him. And afterwards in the principal Case Judgment was given for the Plaintiffe.

Pasch. 12 Jacobi, in the Kings Bench.

353. DOCKWRAY and BEAL's Case.

IN an *Essex* Jury, The opinion of the Court was, That Wood will passe by the name of Land, if there be no other Land whereby the words may be otherwise supplied. Also it was agreed, That the Tenant for Years might fell Underwoods of 25 years growth, if the same hath used to be felled.

Pasch. 12 Jacobi, in the Kings Bench.

354. WROTESLEY and CANDISH's Case.

ELizabeth Wrotesley did recover Dower 6 Jacobi in the Common-Pleas; in which Writ she demanded *tertiam partem Manerii de D. cum pertinaciis, Nec non tertiam partem quarundam terrarum jacent. in Hovelan.* And upon *Ne unque seise que* Dower the parties were at issue, and the *Venire facias* awarded *de Hovelan*: And it was found for the Plaintiffe,

Plaintiffe, and Judgment was given for her. And *Candish* the Defendant brought a Writ of Error in the Kings Bench; and assigned for Error, That it was a Mis-trial: For that the *Venire facias* ought to have been de *Manerio*, and not of *Hovelan*, 6 H. 7. 3. 11 H. 7. 20. C. 6. par. 14. 19 H. 6. 19. 19 E. 4. 17. Yet the Council of the Defendant moved, That the Trial was good for the Land in *Hovelan*: And it being found that the Husband was seised of the Mannor of *D.* that now the Trial was good for the whole.

Pasch. 12 Jacobi, in the Kings Bench.

355. COWLEY and LEGAT'S Case.

Cowley brought an *Audita quarela* against Legat, and the Case was this: Cowley and Bates bound themselves in a Bond of 200^l. jointly and severally to Legat; And afterwards 6 Jacobi, Legat brought an action of Debt upon the Bond against Bates, and had Judgment; and 7 Jacobi the said Legat brought Debt against Cowley in the Kings Bench upon the same Bond, and obtained Judgment; and afterwards he sued forth Execution upon the first Judgment by *Elegit*, and had the Land of Bates, who was Tenant thereof only for another mans life, in Execution; and afterwards he took forth a *Capias ad satisfaciendum* against Cowley upon the Judgment in the Kings Bench: And thereupon Cowley brought an *Audita quarela*, containing in it all the whole matter. And the opinion of all the Justices was, That the *Audita quarela* was well brought, And first it was holden, That when a man may plead the matter in bar, he shall not have an *Audita quarela* upon the matter, because it was his laches that he did not take advantage of it by way of plea. But secondly in this Case it was said, That he could not have pleaded the special matter; and therefore as to that point the *Audita quarela* was well brought. But the onely doubt in the Case was, Whether Legat the Defendant might have a new Execution by *Capias ad satisfaciendum*, after that he had Execution against one of the Obligers by *Elegit*: and the doubt was, because the Judgments upon which he grounded his Executions were given at several times, and in several Courts, and against several persons: For it was agreed by the whole Court, That a *Capias* doth not lie after Execution sued by *Elegit* against the same person; but after a *Capias* an *Elegit* is grantable: And the reason of the difference is, because upon the prayer to have an *Elegit*, it is entred in the Roll, *Elegit sibi executionem per medietatem terra*, so as he is estopped by the Record to have another Execution; but upon a *Capias* nothing at all

258 *Fox and Medcalf's Case.*

is entred upon Record. Yet *Cook* Chief Justice said, That it is the common practice of a good Attorney to deferre the entry in the Roll of Execution upon an *Elegit*, until the Sheriffe hath retorned it served: And in such case it was agreed, That if the Sheriffe retorn upon the *Elegit*, That the party hath not Lands, &c. then the party may take forth a *Capias*. Also the *Elegit* is in it self a satisfactory Execution; and by the Common-Law a man shall have but one Execution with satisfaction. And therefore at the Common-Law, if after Execution the Land had been evicted, the party had no remedy: And *Cook* said, If part of the Land be evicted, the party shall not have remedy upon the Statute of 32 *H.8* cap. 5. to which *Crook* Justice agreed. And the Court held it to be no difference, although that the Judgments were given in several Courts against persons several, and at several times, and where it is but one Judgment against one person. *Vide* the Case 43 *E.3*. 27. where in Debt the Defendant said, That the Plaintiffe had another Action for the same Debt depending in the Exchequer by Bill, Judgment, &c. And by *Monbray* and *Finchden* clearly it is a good plea, although it be in another Court: And *Dodderidge* Justice said, That in the first case the said *Legat* might sue the said *Cowley* and *Bates* severally, and after Judgment he might choose his Execution against which of them he pleased: But he could not have Execution by *Elegit* against them both. And therefore he said, That although there be an Eviction of the Land, or that the Judgment be reversed by Error after that he hath Execution against one by *Elegit*, yet *Legat* could not have Execution against the other: for by the first Execution he had determined his Election, and he could not sue the other: which *Cook* agreed.

Mich. 12 Iacobi, in the Kings Bench.

356. *FOX and MEDCALF's Case.*

IN a Writ of Accompt brought in the Court of *York*, the Plaintiffe had Judgment that the Defendant should accompt: And upon that Judgment the Defendant in the Court there brought a Writ of Error in the Kings Bench. And it was adjudged, That no Writ of Error lay in that case, because the Judgment to Accompt is but the Conveyance, and the Plaintiffe hath not any benefit until he be satisfied by the Award of the Auditors; for upon their Award the final Judgment shall be given.

Mich.

Mich. 12 Iacobi, in the Kings Bench.

357: The Bishop of SALISBURY's Case.

IT was holden in this Case, That if a Bishop, Parson, or other Ecclesiastical person do cut down Trees upon the Lands, unless it be for Reparations of their Ecclesiastical houses; and do or suffer to be done any delapidations: That they may be punished for the same in the Ecclesiastical Court, and a Prohibition will not lie in the Case; and that the same is a good cause of deprivation of them of their Ecclesiastical Livings and Dignities. But yet for such Wastes done they may be also punished by the Common Law, if the party will sue there, *Vide* 2 H.4.3.

Trin. 13 Iacobi, in the Kings Bench.

358. PRAT and the Lord NORTH's Case.

A Man was distreined by the Bailiffe of the Lord North, for 20s. imposed upon him in the Court-Leet for the erecting and storing of a Dove-Cote: And it was said, That it cannot properly be called a Nuisance, but for the destroying of Corn, which cannot be but at certain times of the year: And therefore it was conceived, That the party who was presented might traverse the Nuisance to be with his Pidgeons; and it was said that a man might keep Pidgeons within his new house all the year, or put them out at such a time as they could not destroy the corn: And Cook Chief Justice said, That there is not any reason that the Lord should have a Dove-Cote more then the Tenant; and he asked the Question, where the Statute of E.2. saith, *Inquiratur de Dove-Cotes erected without Licence, Who should give the Licence?* *Ad quod non fuit responsum.* In Mich. Term following the Case was argued by Dampier, who said, That the erecting of a Dove-Cote by a Freeholder was no Nuisance: For a Writ of Right lieth of a Dove-Cote, and in the Register it is preferred and named before Land, Garden, &c. But he said that there was a fatal defect in the Plea; which was, That the Presentment at the Leet was, That Prat had erected a Dove-Cote unlawfully, and did not say *ad commune nocumentum*, as it ought to be, otherwise it is not presentable in the Leet: And therefore although it was otherwise in the Plea, That it was *ad commune nocumentum*, the same did not help the defective Presentment.

Mich. 10 Jacobi, in the Common-Pleas.

359. GREENWAY and BARKER's Case.

BETWIXT *Greenway* and *Barker*, It was moved for a Prohibition to the Court of Admiralty; and the Cause was for taking of a Recognisance in which the Principal and his Sureties, his heirs, goods and lands were bounden: And it was in the nature of an Execution at the Common-Law; and thereupon they in the Admiral Court made out a Warrant to arrest the body of the Defendant there. *Dodderidge* Serjeant said, That it was not a Recognisance at the Common-Law, but only a Stipulation, in the nature of a Bail at the Common-Law; and he said, That it was the usual course to pledge goods there in Court to answer the party if sentence were given against him. *Nichols* Serjeant: They cannot take a Recognisance; and by the Civil Law, if the party render his body the Sureties are discharged; and Execution ought to be only of the goods, for the ship is only arrested; and the Libel ought to be only against the ship and goods, and not against the party, 19 *H. 6. acc.* And afterwards *Dr. Steward* and *Dr. James* were desired by the Court to deliver their opinions what the Civil Law was in this Case: and *Doctor Steward* said, He would not rest upon the Etymologie of the word; for if it be a Recognisance, Bail, or Stipulation, it is all one in the Civil Law; and in such case he said by their Law Execution might be against the sureties. And he argued, 1. That *ex necessitate* it must be agreed that there is an Admiral Court. 2. That that Court hath a Jurisdiction: And by a Statute made in *Henry* the 8. time, and by another in the time of *Queen Elizabeth*, divers things as Appeals, &c. were triable by the Civil Law. And he said, That every Court hath his several form of proceedings; and in every Court that form is to be followed which it hath antiently used: And as to the proceedings he said, That first they do arrest the goods; 2. That afterwards the party ought to enter Caution, which is not a Bond, but only a Surety or Security, which doth bind the parties: And he said, That the word *Haredes* was necessary in the Instrument, For for the most part the Sureties were strangers: And he said, That Court took no notice of the word (*Executors*) and therefore the word *Haredes* is used, which extends as well to Executors and Administrators as to Heirs: And he said, That upon a Judgment given in the Court of Admiraltie, they may sue forth an Execution of it in forein parts, as in *France*, &c. And he said, That if Contracts be made according to other Laws, the same must be tryed according to the Law of that Country where

the Contract is made. Dr. James said, That in the same Court there are two manners of proceedings; 1 The Manner, 2 the Customs of the Court are to be observed. And he said, that Stipulation ought to be in the Court by coercion, which word is derived (*à stipite*) by which the party is tyed (as he said) as a Bear to the stake, or as *Ulysses* to the Mast of the ship. And he said, In a Judicial stipulation four things are considerable: 1. The Judicial Siftem; 2. *Reparatum habere*; 3. *Judicatum solvere*; 4. *De expensis solvendis*, as appeareth in *Justinians Institutes cap. de Satisfactionibus*: For *Satisfactio* and *Stipulatio* are all one in the Civil Law. And after *Cook* Chief Justice said, That it ought to be confessed that there hath been a Court of Admiralty; 2. That their proceedings there ought to be according to the Civil Law. And he observed four things, 1. The Necessity of the Court, 2. The Antiquity of it, 3. The Law by which they proceed, and lastly the Place to which they are confined. And as to the necessity of the Court he said, That the Jurisdiction of that Court ought to be maintained by reason of Trade and Traffique betwixt Kingdom and Kingdom; for Trade and Traffique is as it were the life of every Kingdom. 2. A mans life is in danger by reason of traffique, and Merchants venture all their estates; and therefore it is but reasonable that they have a place for the trial of Contracts made upon the Sea by them or their Factors. And for the Antiquity of the Court, *v. l' E. 1. sitz. l' Annuity. 7 R. 2. l' trespass in Statham*. And so long as there hath been any Commerce and Traffique by this Kingdom, so long there hath been a Court of Admiralty. 3. He said, The Court of Admiralty is no Court of Record in which a Writ of Error lieth, 37 *H. 6. acc.* 4. He considered the place: And that he said was of things *super altum mare* only, as appeareth by the Stat. of 13 *R. 2.* And he said, That all the Ports and Havens within *England* are *infra corpus Comitatus*; and vouched 23 *H. 6. & 30 H. 6.* *Hollands Case*, who was Earl of *Exeter* and Admiral of *England*: who because he held plea in the Court of Admiralty of a thing done *infra Portam de Hull*, damages were recovered against him of 2000*l.* And he said, That if the Court and Civil Law be allowed, then he said the Customs of that Court ought to be allowed; and he said, That the Custome of the Civil Law is, That in no case the Surety is chargeable, when the Principal is sufficient: And he agreed with the Doctors, That the word *Heredes* ought to be in the Stipulation, because those beyond the Seas did not take any cognisance of the word *Executors*. Also he said, That they may take the body in Execution, which are for the most part the Masters of the ships and Merchants, who are *transseantes*, and therefore if they could not arrest their bodies they might perhaps many times lose the benefit of their suits. But he said, that in no case they might take forth Execution upon Lands. And he said, That if a Contract be made in *Paris in France*, it shall be tryed either by the Common Law, or by the Law of *France*: and if it be tryed

here,

here, then those of *France* shall write to the Justices of *England*, and shall certify the same unto them. And he said, That in *Sir Robert Dudley's* Case it was allowed for good Law; where a Fine was levied and acknowledged in *Orleanse* in *France*, which was certified and allowed for good by the Common Law here in *England*: But he said, That the Civil Law could not determine of the Fine. And to conclude, he said, That no Custome can be good which is against an Act of Parliament. The principal Case was adjourned.

Mich. 13 Jacobi, in the Kings Bench.

360. The MAIOR of YORK'S Case.

IN an Action of False Imprisonment brought, It was holden by the whole Court, 1. That no man can claim to hold a Court of Equity, viz. of Chancery, by Prescription; because every Prescription is against Common Right, and a Chancery-Court is founded upon Common Right, and is by the Common Law. 2. It was holden *per Curiam*, That the King by his Charter cannot grant to another any of the Customs of *London*: But the like Liberties, Franchises and Customs as *London* holdeth or useth, the King by his Letters Patents may grant. *Quere*, because the Customs in *London* are confirmed by Act of Parliament.

Mich. 13 Jacobi, in the Kings Bench.

361. LAMBERT and SLINGBY'S Case.

A Man brought an Action of Debt as Administrator, and took the Defendants body in Execution. The Sheriffe suffered him to escape. And afterwards a Will was found, by which Will the said Administrator is nominated Executor. The Question now was, Whether he might maintain an Action against the Sheriffe for the Escape as Executor when he was but Administrator at the time: and it was the opinion of the Court that the action of Debt against the Sheriff upon the Escape would lie, and that the same Debt should be assets in the Executors hands. And it was holden cleer, That the Executor of an Executor might have Debt upon the Escape, for that he is Executor to the first Testator; and therefore *a fortiori* the Action in the principal Case would lie.

Mich.

Mich. 13 Iacobi, in the Common-Pleas.

362.

IT was holden by the Court, That if a man present by Usurpation to my Advowson, within six moneths I may have a *Quare Impedit*: But after the six moneths past, if the Church become void, I cannot present, but am put to my Writ of Right of Advowson. And that if a man usurpeth upon the King, he is put to his *Quare Impedit* within the six moneths. And it was holden, That a double Usurpation upon the King doth put him to his Writ of Right. *v. 22 & 24 E.3 acc.*

Pasch. 13 Iacobi, in the Kings Bench.

363. OWEN alias COLLIN's Case.

John Owen alias Collins of Godstow in the County of Oxford, was indicted and arraigned of High-Treason, for speaking these traitorous English words at Sandwich in the County of Kent, viz. *If the King be excommunicate by the Pope, it is lawfull for every man to kill him, and it is no murder: For as it is lawfull to put to death a man that is condemned by a Temporal Judge, so it is lawfull to kill the King if he be excommunicate by the Pope: For that is the execution of the Law, and this of the Popes supreme sentence; The Pope being the greater, includes the King being the lesser.* To which words he pleaded Not guilty. And the Evidence to the Jury was, the Major of Sandwich, a Parson of the same Town, and the Servant of the Town-Clark. And this was the sum of the Evidence, That the said Owen coming from S. Lucar in Spain, spake the said words to divers persons, who told them to the Major: whereupon the said Major had conference with Owen, and then he spake the like words unto the Major; and thereupon the Major tendred unto him the Oath of Allegiance, which he refused to take, and he put his hand to awriting containing the said words as his opinion; and further said, That if he had twenty hands he would put them all to it. The Exception which Owen took unto the Evidence given against him was, That he did not speak of the King of England. But the same was said to be a simple Exception: For before he spake the words to the Major, the Major asked him if he were:

were an Englishman, or not? To which he answered, that he was; and then after, he spake the said words to the Major, which must necessarily have reference to the speeches which were before betwixt him and the Major. And *Cook* Chief Justice said, That if he had not spoken of the King of *England*, but of the King generally, yet it had included the King of *England*. The matter of his Indictment of Treason was not grounded upon the Statute of Supremacie, but upon the Common-Law, of which the Statute of 25 E. 3. is but an Explanation; which was, his intent to compass the death of the King. And he said, That notwithstanding that the words as to this purpose were but conditional, viz. *If he were Excommunicate*, yet (he said) it was High-Treason. For proof of which two Cases were cited. The Duke of *Buckingham*, in the time of King *Henry* the 8. said, That if the King should arrest him of High-Treason, that he would stab him with his dagger: and it was adjudged a present Treason. So was it also adjudged in the Lord *Stanley's* Case, in the time of King *Henry* the 7. who seeing a Young-man, said, That if he knew him to be one of the Sons of *E.4.* that he would aid him against the King. In the like manner a woman in the time of *Hen.8.* said, That if *Henry* the 8. would not take again his wife *Queen Katherine*, that he should not live a year, but should die like a dog. So if discontented persons with Inclosures say, That they will petition unto the King about them, and (if) he will not redress the same, that then they will assemble together in such a place and rebell: In these Cases it is a present Treason: and he said, That in point of Allegiance none must serve the King with *Is* and *And*s. Further, *Cook* Chief Justice said, That *Faux* the Gunpowder Traitor being brought before King *James*, the King said to him, *Wherefore would you have killed me?* *Faux* answered him, viz. *Because you are excommunicated by the Pope.* How? said the King. He answered, *Every Maunday-Thursdai the Pope doth excommunicate all Heretiques who are not of the Faith of the Church of Rome; and you are within the same Excommunication.* And afterwards *Owen* was found guilty, and Judgment of Treason was given against him.

Mich. 13 Jacobi, in the Kings Bench.

364.

SIMPSON'S Case.

Richard Simpson a Copy-holder in Fee, *jacens in extremis*, made a Surrender of his Copyhold *habendum* to an *Enfant in ventre-samier* and his heirs; and if such *Enfant* die before his full age or marriage, then to *John Simpson* his brother and his heirs. The *Enfant* is born, and dieth within

within two moneths : Upon which *John* was admitted, and a Woman as Heir-general to the Devisor and to the Enfant is also admitted and entred into the Land, against whom *John Simpson* brought an Action of Trespasse, and it was adjudged against the Plaintiffe. And two points were resolved in this Case. 1. That a Surrender cannot begin at a day to come, no more then a Livery, as it was adjudged 23 *Eliz.* in this Court in *Clarks* Case. 2. That the Remaindor to *John Simpson* cannot be good, because it was to commence upon a Condition precedent, which was never performed : And therefore the Surrender into the hands of the Lord was void ; for the Lord doth not take but as an Instrument to convey the same to another. And it was therefore said, That if a Copyholder in Fee doth surrender unto the use of himself and his heirs, because that the Limitation of the use is void to him who had it before, the Surrender to the Lord is void.

Trin. 13 Jacobi, in the Chancery.

365. The Lord GERARD'S Case.

IT was holden in the Chancery in the Lord *Gerards* Case against his Copyholds of *Audley* in the County of *Stafford*, That where by anti-ent Rolls of Court it appeareth that the Fines of the Copyholds had been uncertain from the time of King *Hen.* the 3 to the 19 of *H.* the 6. and from thence to this day had been certain, Except twenty or thirty : That these few anti-ent Rolls did destroy the Custome for certainty of Fine. But if from 19 *H.* 6. all are certain except a few, and so incertain Rolls before, the few shall be intended to have escaped, and should not destroy the Custome for certain Fines.

Hill 13 Jacobi, in the Common-Pleas.

366. BAGNAL and HARVEY'S Case.

IN a Writ of Partition it was found for the Plaintiffe : And a Writ was awarded to the Sheriffe, that he should make the partition : And the Sheriffe did thereupon allot part of the Lands in severalty ; and for other part of the Lands, the Jurors would not assist him to make the partition. All which appeared upon the Return of the Sheriffe. And an

Attachment was prayed against the Jurors who refused to make the Partition; and a new Writ was prayed unto the Sheriffe. And the Court doubted what to do in the Case, whether to grant an Attachment or not, and whether a new Writ to the Sheriffe might be awarded; And took time to advise upon it, and to see Presidents in the Case.

Hill. 13 Jacobi, in the Kings Bench.

367.

BLANFORD'S CASE.

A Man seized of Lands in Fee devised them unto his Wife for life, and afterwards to his two Sons, if they had not issue males, for their lives; and if they had issue males, then to their issue males; and if they had not issue males, then if any of them had issue male, to the said issue male. The wife died, the sons entred into the lands, and then the eldest son had issue male who afterwards entred, and the younger son entred upon the issue and did trespassse, and the issue brought an Action of Trespasse: And it was adjudged by the whole Court, that the Action was maintainable, because by the birth of the issue male the lands were devised out of the two sons, and vested in the issue male of the eldest. *Crook* Justice was against the three other Justices.

Hill. 13 Jacobi, in the Kings Bench.

368.

BROOK and GREGORY'S CASE.

IN a *Replevin* the Defendant did avow the taking of the Cattel damage feasant. And upon issue joyned it was found for the Plaintiffe in the Court at *Windsor*, being a Three-weeks Court. And the Defendant brought a Writ of Error, and assigned for Error, That the Entry of the Plaint in the said Court was the 7. day of *May*, and the Plaintiffe afterwards did Declare there of a taking of the Cattel the 25. day of *May*. And whether the same was Error, being in a Three-weeks Court, was the Question: and 21 E. 4. 66. was alleadged by *Harris*, that it was no Error. But the Court held the same to be Error, because no Plaint can be entred but at a Court; and this Entry of the Plaint was mesne betwixt the Court-dayes, and so the Declaration is not warranted, no Custome being alleadged to maintain such an Entry. 2. It was holden by the Court in

this Case, That after *In nullo est erratum* is pleaded, the Defendant cannot alleadge Diminution, because there is a perfect issue before. 3. It was holden, That a man cannot alleadge Diminution of any thing which appeareth in the Record to be true. And because the Defendant did alleadge Diminution in this Case of the Record, and by the Record it was certified that the Plaint was entred the 25 day of *May*, the same was not good after issue joyned, and after Judgment is given upon the said Record upon the first Declaration and Pleading in the said Court of *Winſor*. And therefore the Judgment was reverſed by the opinion of all the Juſtices.

Hill. 13 Jacobi, in the Kings Bench.

369. BISSE and TYLER's Case.

IN an Action of Trover and Conversion of goods, the Defendant ſaid, That J. S. was poſſeſſed of the ſaid goods, and ſold them unto him in open market. *Quære* whether it be a good Plea, becauſe it doth amount to the general iſſue of Not guilty. *Curia aviſare vult.* And *v. Tompſons* Caſe, 4 Jac. in the Kings Bench, It was adjudged that it was no good Plea.

Hill. 6 Jacobi, in the Common-Pleas.

370. PAGINTON and HUET's Case.

IN an *Ejectione Firme* the Caſe was this, That the Cuſtome of a Manor in *Worceſterſhire* was, That if any Copyholder do commit Felony, and the ſame be preſented by twelve Homagers, That the Tenant ſhould forfeit his Copyhold: And it was preſented in the Court of the Mannor by the Homage, That *Hunt* the Defendant had committed Felony. But afterwards at the Aſſiſes he was acquitted: And afterwards the Lord ſeiſed the Copyhold. And it was adjudged by the Court that it was no good Cuſtom, becauſe in Judgment of Law before Attaindor it is not Felony. The ſecond point was, Whether the ſpecial Verdict agreeing with the Preſentment of the Homage, That the party had committed Felony, did entitle the Lord to the Copyhold notwithstanding his Acquital. *Quære*, For it was not reſolved.

Mich. 7. Iacobi, in the Common Pleas.

371.

THe Custom of a Mannor was, That the Heirs which claimed Copyhold by Discent, ought to come at the first, second, or third Court upon Proclamations made, and take up their Estates or else that they should forfeit them. And a Tenant of the Mannor having Issue inheritable beyond the Seas, dyed : The Proclamations passed, and the Issue did not return in twenty years. But at his coming over he required the Lord to admit him to the Copyhold, and proffered to pay the Lord his Fine : And the Lord, who had seised the Copyhold for a Forfeiture, refused to admit him. And it was adjudged by the whole Court, That it was no Forfeiture, because that the Heir was beyond the Seas at the time of the Proclamations, and also because the Lord was at no prejudice because he received the profits of the Lands in the mean time.

Mich. 14 Iacobi, in the Kings Bench.

372.

A Copyholder in Fee did surrender his Copyhold unto the use of another and his heirs, which surrender was into the hands of two Tenants according to the custome of the Mannor to be presented at the next Court. And no Court was holden for the Mannor by the space of thirty years ; within which time the Surrenderor, Surrenderee, and the two Tenants all dyed : The heir of the Surrenderor entred, and made a Lease for years of the Copyhold according to the custome of the Mannor ; And it was adjudged *per Curiam*, That the Lease was good.

Mich. 14 Iacobi, in the Common-Pleas.

373. *FROSWEL and WEICHES Case.*

IT was adjudged, That where a Copyholder doth surrender into the hands of Copy-Tenants, That before Presentment the Heir of the Surrenderor

Surrenderor may take the profits of the Lands against the Surrenderee : For no person can have a copyhold but by admittance of the Lord. As if a man maketh Livery within the view, although it cannot be countermanded, yet the Feoffee takes nothing before his entry : But it was agreed, That if the Lord doth take knowledge of the Surrender, and doth accept of the customary Rent as Rent due from the Tenant being admitted, that the same shall amount unto an Admittance, but otherwise if he accept of it as a duty generally.

Mich. 5 Jacobi, in the Exchequer.

374.

IT was adjudged in the Exchequer, That where the King was Lord of a Mannor, and a Copyholder within the said Mannor made a Lease for three lives, and made Livery ; and afterwards the Survivor of the three continued in possession forty years : And in that case because that no Livery did appear to be made upon the Endorsment of the Deed, (although in truth there was Livery made) that the same was no forfeiture of which the King should take any advantage. And in that case it was cited to be adjudged in *Londons case*, That if a Copy-Tenant doth bargain and sell his Copy-Tenement by Deed indented and enrolled, that the same is no forfeiture of the Copyhold of which the Lord can take any advantage. And so was it holden in this Case.

Pasch. 14 Jacobi, in the Kings Bench.

375.

FRANKLIN'S Case.

Lands were given unto one and to the heirs of his body, *Habendum* unto the Donee, unto the use of him, his heirs and assigns for ever. In this case two points were resolved. 1. That the Limitation in the *Habendum* did not increase or alter the Estate contained in the premisses of the Deed. 2. That Tenant in Tail might stand seised to an use expressed, but such use cannot be averred.

Hill. 13 Iacobi, in the Chancery.

376 WINCOMB and DUNCHES Case.

V*V* *Inscomb* having issue two sons, conveyed a Mannor unto his eldest son, and to the daughter of *Dunch* for life, for the joynture of the wife, the Remainder to the son in fee. The son having no issue his Father-in-law *Dunch* procured him by Deed indented, to bargain and sell to him the Mannor. The Bargaynor being sick, who died before enrolment of the Deed within the six moneths, the Deed not being acknowledged: And afterwards the Deed coming to be enrolled, the Clark who enrolled the same, did procure a Warrant from the Master of the Rolls, who under-writ upon the Deed, *Let the Deed be enrolled upon Affidavit made of the delivery of the Deed by one of the Witnesses to the same.* And afterwards the Deed was enrolled within the six moneths. And the opinion of the Court was, *That the Conveyance was a good Conveyance in Law.* And therefore the younger brother exhibited his Bill in Chancery, pretending the Conveyance to be made by practice, without any Consideration.

Mich. 15 Iacobi, in the Kings Bench.

377 LUDLOW and STACIES Case.

A Man bargained and sold Land by Deed indented, bearing date 11 Junii 1 Iacobi. Afterwards 12 Junii. The same year Common was granted unto the Bargainee for all manner of Cattrell commonable upon the Land. 15 Junii the [Deed of Bargain and Sale was enrolled. And it was adjudged a good grant of the Common. And the Enrolment shall have Relation as to that, although for collaterall things it shall not have relation.

Hill. 15 Iacobi, in the Kings Bench.

378.

Note that it was held by *Dodderidge* Justice, and *Montragu* Chief Justice, against the opinion of *Hanbbron* Justice, That if Lessee for years

years covenanteth to repair and sustein the houses in as good plight as they were at the time of the Lease made; and afterwards the Lessee assigneth over his Term, and the Lessor his Reversion: That the Assignee of the Reversion shall maintain an Action of Covenant for the breach of the Covenants against the first Lessee.

Hill. 15 Jacobi, in the Common-Pleas.

379. SMITH and STAFFORD's Case.

A Man promised a Woman, That if she would marry with him, that if he dyed, and she did survive him, that he would leave unto her 100l. They entermarried; and then the husband dyed, not performing his promise. The wife sued the Executor of her husband upon the said promise. And whether the duty did survive with the wife, or were extinguished by the entermarriage, was the Question. And *Hobart* Chief Justice and *Warburton* were against *Winch* and *Hutton* Justices, That the marriage was a Release or discharge of the 100l. *Quare.*

Hill. 15 Jacobi, in the Kings Bench.

380. PLOT's Case.

A N Enfant brought an Assise in the Kings Bench for Lands in *Middlesex* depending which, The Tenant in the same Assise brought an Assise for the same Lands in the Common-Pleas; which last Writ bore date and was returnable after the first Writ. And the Demandant in the second Writ did recover against the Enfant by default, by the Assise who found the Seisin and Disseisin. And upon a Plea in bar of the first Assise of that Recovery, the Enfant by way of Replication set forth all the special matter, And that the Demandant at the time of the second Writ brought was Tenant of the Land: And prayed that he might falsifie the Recovery. And it was adjudged, That he might falsifie the Recovery. For in all Cases where a man shall not have Error, nor Attaint, he may Falsifie: But in this case he could not have Error nor Attaint, because the Judgment in the Common-Pleas was not given only upon the Default, but also upon the Verdict. And it should be in vain for him to bring an Attaint, because he shall not be admitted to give other Evidence then what was given at the first Trial. Also he shall falsifie the Recovery, because it was a practise to defeat and take away the Right of the Enfant, and to leave him without any remedy whatsoever.

Pasche.

*Pasch. 16 Iacobi, in the Kings Bench.*381. *INGIN and PAYN's Case.*

Lessee for years was bounden in a Bond to deliver the possession of a house unto the Lessor, his heirs and assigns upon demand at the end of the term. The Lessor did bargain and sell the Rendition by Deed enrolled to two: One of the Bargainees at the end of the term demanded the Delivery of the Possession: The Lessee refused, pretending that he had no notice of the bargain and sale. It was adjudged that the Bond was forfeited.

*Pasch. 16 Iacobi, in the Common-Pleas.*382. *JERMYN and COOPER's Case.*

A Man by Deed gave Lands to *A.* and to a Feme sole, and to their heirs and assigns for ever; *Habendum* to them and to the heirs of their bodies, the Remainder to them and the survivor of them for ever. And it was adjudged by the Court, That they had an Estate in tail, with the Fee-simple Expectant.

Pasch. 16 Jacobi, in the Kings Bench.

383.

A Man was Indicted *De verberationem & vulnerationem* of *7. S.* and the words (*vi & armis*) were left out of the Indictment. And the same was adjudged to be helped by the Statute; and that the Indictment was good.

*Mich. 16 Jacobi, in the Kings Bench.*384. *BARNWEL and PELSIE's Case.*

A Parson did Covenant and grant by Deed with one of his Parishioners, That in consideration of Six pounds thirteen shillings and
four

whether there was a grant by Deed or not: That when the Jury find that the Sheep-walk did passe, it shall be intended that there was a Deed. *Dodderidge* Justice in the Argument of this Case did hold, That by the word (*Ovile*) although it be translated in English a Sheep-walk, yet a Sheep-walk did not passe by it but a Sheep-Cote, and by that the Land it self did passe.

Hill. 16 Iacobi, in the Kings Bench.

387.

HILL and WADE's Case.

HILL brought an Action upon the Case against *Wade*, and declared upon an *Assumpsit* to pay money upon request; and did not alleadge the Request certain: but issue was joyned upon another point, and found for the Plaintiffe, That the failing of certain alleadging of the Request in the Declaration made the same insufficient. And so it was adjudged by the Court with this difference, where it was a duty in the Plaintiffe before, and where the Request makes it a duty: For in the first case the Plaintiffe need not alleadge the Request precisely, but otherwise in the later. *Dodderidge* Justice put this Case. If I promise *7. S.* in consideration that he will marry my daughter, to give him 20l. upon request, there the day and place of the request ought to be alleadged in the Declaration. *Montagu* Chief Justice cited 18 *E. 4.* and 5 *H. 7.* to be contrary, viz. That the finding of the Jury made the Declaration which was vitious to be good: As if Executors plead, That they have nothing in their hands the day of the Action brought, it is insufficient; But if the Jury find Assets it is good, and so by consequence the Verdict shall supply the defect of Pleading. But the Court held these books to be good Law, and not to be contrary, and well reconciled with this difference: For there the Plea was naught only in matter of circumstance; but otherwise it is, where it is vitious in substance, as in this case it is. And a difference also was taken where the Verdict doth perfect all which is material and ought to be expressed, and where not: For in the principal Case, notwithstanding that the Jury find the *Assumpsit*, yet the same doth not reach to the Request, and without that the *Assumpsit* is void. *Dodderidge* Justice cited 5 *E. 4.* That if the Declaration be vitious in a point material, and issue is taken upon another point, there the finding of it by the Jury doth not make the Declaration to be good. And so in the principal Case Judgment was given for the Defendant. In this Case it was agreed, That if a man bring an Action of Trover and Conversion, and not alleadge a place where the Conversion was. Although the issue for the Trover be found for the Plaintiff, yet he shall not have Judgment.

Hill.

Hill. 16 Jacobi, in the Kings Bench.

388. GODFREY and DIXON's Case.

Cornelius Godfrey brought an Action of Debt upon a Lease against *Dixon*, and declared, That *Cornelius Godfrey* his Father being an Alien, had issue *Daniel Godfrey* born in *Flanders*: the Father is made a Denizen, and hath issue the Plaintiffe his second son born in *England*. The Father dieth: *Daniel* is Naturalized by Act of Parliament, and made the Lease to *Dixon* for years rendring Rent, and dyed without issue: And the Plaintiffe his brother brought an Action of Debt for the Arrearages as heire, and upon that it was demurred in Law. And *George Crook* in his Argument said, That Inheritance is by the Common-Law, or by Act of Parliament: And that three persons cannot have heirs *in transversali linea*, but *in recta linea*, viz. 1. A Bastard, 2. A person Attainted, 3. An Alien; see for that 39 *E.3.39. Plow. Dom. 445. 17 E.4.1. 22 H.6.38. 3 E.1. sitz. 1. & Dr. & Student*. And he said, That Denization by the Kings Charter doth not make the heir inheritable, 36 *H.8.Br. to Denizen*, and *C. 7. part. 77*. And he said, That he who inheriteth ought to be, 1. Next of blood, 2. Of the whole blood, and 3. He ought to derive his Pedigree and discent from the stock and root, *Bracton lib. 2. fol. 51*. And he said, That if a man doth covenant to stand seised to the use of his brother being an Alien, that the same is not good and the use will not rise: But that was denied by the Court. And he said, That an Alien should not have an Appeal of the death of his brother: And he took a difference betwixt an Alien and a person Attainted; and said, that the one was of corrupt blood, the other of no blood, and cited 9 *E.4.7. & 36 Eliz. Hobby's Case*. *Dodderidge* upon the argument of this Case said, That if a man claim as Cousin and Heir, he must shew how he is Cousin and Heir; but not when he claims as Brother, or Son and Heir. The Case was adjourned.

Hill. 16 Jacobi, in the Kings Bench

389

GRAY's Case.

AN Action of Debt was brought upon a Bond with Condition to stand to an Arbitrement, and also that he should not begin, proceed

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in, or prosecute any suit against the Obliger before such a Feast. The Obliger did continue a Suit formerly brought. *George Crook* said, That the Bond was forfeited, because it is the act of the Obliger to continue or discontinue a suit, and profit accrues to him, therefore it shall be adjudged his act: But it is otherwise of an *Essoin*, because that that may be cast by a stranger. And he cited the books of 36 H. 6. 2. 5 H. 7. 22. 14 E. 4. 1. 18 H. 6. 9. And he held, That it was a good Award to continue, or discontinue a suit, because it is in the power of the party to do it, or not.

Hill. 16 Jacobi, in the Kings Bench.

390

SLYE's Case:

IN a *Scire facias* to have Execution, the Sheriffe returned, That by virtue of a Writ of *Fieri facias* he took the goods in Execution *ad valentiam* of 11^l. which remained in his custody for want of buyers, and that they were rescued out of his possession. *Mountagu* Chief Justice and *Dodderidge* Justice, The Plaintiffe shall have an Execution against the Sheriffe; & relyed upon the book of 9 E. 4. 50. & 16 E. 4. *Faulconbridge* Case. 7 Eliz. *Dyer* 241. 5 E. 3. 1. Execution, & C. 5. par. *Pettifers* Case. And *Dodderidge* said; That by this Return he had concluded himself, and was liable to the value of 11^l. And he took this difference, where the Sheriffe by virtue of the Writ *Venditioni exponas* sels the thing under the value, there he shall be discharged, but otherwise where he sels the goods *ex officio*. *Crook* and *Haughton* Justices, The Plaintiffe shall not have a *Scire facias* against the Sheriffe, but where he hath the money in his purse: And they said, That the Plaintiffe must have a *Distringas* directed to the new Sheriffe, or a *Venditioni exponas*. Note, the Court was divided in opinion: But the Law seems to be with *Crook* and *Haughton*; and the books before cited prove their difference, and warrant it.

Hill. 16 Jacobi, in the Kings Bench.

391 Sir JOHN BRET and CUMBERLAND's Case.

IN an Action of Covenant brought by Sir *John Bret* against *Cumberland* Executor of I.C. the Case was this. Q. Eliz. by her Letters Patents did

did demise a Mill unto the Testator for 30 years reserving Rent; and these words were in the Letters-Patents. viz. *That the Lessee, his Executors and Assignes should repair the Mill during the Term.* The Lessee assigned over all his interest unto *Fish*, who attorned Tenant and paid the Rent to the Queen; and afterwards the Queen granted the Reversion to Sir *John Bret* and *Margaret* his wife. The Assignee is accepted Tenant; the Mill came to decay for want of Reparations, and Sir *John Bret* brought an Action of Covenant against the Executor of the first Lessee; And it was adjudged for the Plaintiffe. And *Dodderidge* Justice gave the reasons of the Judgment, 1. Because that by the Statute of 32 H.8. all the benefit which the Queen had was transferred to the Grantee of the Reversion. 2. It might be parcel of the Consideration, to have the Covenant against the Lessee: For a Mill is a thing which without continual Reparations will be ruinous and perish and decay: And he said. That the Assignee had his election to bring his Action against the Lessee or against the Assignee, because it was a Covenant which did run with the Land. *Mountagu* Chief Justice said, That the reason of the three Cases put in *Walkers Case* is in respect of the Interest: And took a difference where there is privity of Contract, and where not. It was adjourned.

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Hill. 16 Jacobi, in the Kings Bench.

392.

WEBB and Tuck's Case.

IN an Action of False Imprisonment it was agreed, That a Fine may be assessed for Vert and Venison. And it was said in this Case by the Justices, That a Regarder is an Officer of whom the Law takes knowledge; and so are Justices in Eyre. 2. It was agreed That such things of which the Law takes notice ought to be pleaded. 3. That if a man in his pleading is to set forth the jurisdiction of the Court of Justices in Eyre, if he say *Curia tent. &c.* he need not set forth all the Formalities of it. And *Mountagu* Chief Justice in this Case said, That if a man do justify for divers causes, and some of the causes are not good, the same doth not make the whole Justification to be void, but it is void for that only, and good for the residue.

Hill.

Hill. 16 Jacobi, in the Kings Bench.

393: CULLIFORDS Case.

Culliford and his Wife brought an Action upon the Case against Knight for words: And declared upon these words, viz. *Thou art Luscombs Hackney, a pockey Whore, and a theevish Whore, and I will prove thee to be so*; which was found for the Plaintiffe; And in arrest of Judgment it was moved that the words were not Actionable, which was agreed by the whole Court *quia verba accipienda sunt in mitiori sensu*: And Judgment was staied accordingly.

4 Eo. 13. a. (c)

Hill. 16. Jacobi, in the Kings Bench.

371.

IN an Action upon the Case for Words: The Plaintiffe did relate that he was brought up in the Studie of a *Mathematician*, and a Measurer of Land: And that he was a Surveyor: and that the Defendant spake these words of him, viz. *Thou art a Cosener and a cheating Knave, and that I can prove*. And the opinion of the Court was, That the words were actionable: And Montague Chief Justice, said that it was ruled accordingly in 36 Eliz. Rot. 249. betwixt Kirby and Walter. And a Surveyor is an Officer of whom the Statute of 5. E. 6. takes notice: And he said, that *Verba de persona intelligenda sunt de Conditione persone*: And he said that the words are Actionable in regard it is a faculty to be a Measurer of Lands. But Dodderidge Justice put it with a difference, viz. Betwixt a Measurer of Land by the Pole, and one who useth the Art of Geometrie or any of the Mathematicks; for he said that in the first Case it is no scandal, for that his Credit is not impeached thereby; but it is contrary in the other Case, because to be a Geometritian or Mathematicitian is an Art or faculty which every man doth not attain unto, And he put this Case: If a man be Bailiffe of my Mannor, there no such words can discredit him; and by consequence he shall not have an Action for the words, because the words do not found in discredit of his Office; because the same is not an Office of Skill, but an Office of Labour. *quod nota.*

4 Eo. 13. a. (c)

Hill.

Hill. 16 Jacobi, in the Kings Bench.

395.

BISHOP *and* TURNERS Case.

IN a Prohibition it was holden by the whole Court, That for such things as a Church-Warden doth *ratione officii* no Action will lie by his successor against him in the Spiritual Court; and a Churchwarden is not an Officer but a Minister to the Spiritual Court; But it was holden that a Churchwarden by the Common Law may maintain an Action upon the Case for defacing of a Monument in the Church.

*Trin. 16 Jacobi, in the Kings Bench.*396. BLACKSTON *and* HEAP's Case.

IN an Action of Debt for Rent, the Case was this: A man possessed of a Term for 20 years in the right of his Wife made a Lease for 10 years, rendring Rent to him his Executors and assignes and died. The Question was, whether the Executors or the Wife should have the Rent: *Haughton and Crook*, Justices against *Montague* Chief Justice (*Doddridge* being absent) that the Rent was gon: But it was agreed by them all that the Executors of the Husband should not have it; But *Montague* held that the Wife should have it. But it was agreed that if Lessee for 20 years maketh a Lease for 10 years, and afterwards surrendreth his Term, that the Rent is gon: And yet the Term for 10 years continues. And in the principal Case, If the Husband after the Lease made had granted over the Reversion, his grantee should not have the Rent. But *Montague* said, that in that Case the Wife in Chancery might be Relieved for the Rent.

Mich.

Mich. 16 Iacobi, in the Kings Bench.

397. WAIT and the Inhabitants of STROKE'S
Cafe.

W Ayte a Clothier of Nybery was robbed in the Hundred of Stroke of 50*l.* upon the Saboth day in the time of Divine Service. The Question was whether the Hundred were chargeable or not for not making out Hue and Cry. And 3 of the Justices were against Montague Chief Justice, that they were chargeable, For they said that the apprehending of Theeves was a good work, and fit for the Saboth day, and also fit for the Commonwealth. Montague Chief Justice agreed that it was *bonum opus*; and that it might be lawfully done: But he said that no man might be compelled upon any penalty to do it upon that day: For he said, That if he hath a Judgment against *I. S.* and he comes to the Parish-Church where *I. S.* is with the Sheriffe, and shews unto the Sheriffe *I. S.* upon the Saboth day, and commandeth the Sheriffe to do his Office, If the Sheriffe do arrest *I. S.* in Execution upon that day, it is good, but if he doth not arrest him it is no escape in the Sheriffe. And he took a difference betwixt Ministerial Acts and Judicial Acts, for the first might be done upon the Saboth day; but Judicial Acts might not. But the case was adjudged according to the opinion of the three other Justices.

Pasch. 17 Iacobi, in the Kings Bench.

398. SPICER and SPICE'S Cafe.

U Pon a special Verdict the Cafe was this: A man seised of Gavil-kind Land, devised the same to his Wife for life, paying out of it 3*l.* *per annum* to his eldest son, and also devised the Land to his second Son paying 3*l.* *per annum* to his third Son, and 20*s.* to such a one his Daughter: and whether the second Son had the Land for his life or in Fee, was the Question. And it was adjudged that he had a Fee-simple in it by reason of the payment of the Collateral Sums of 3*l.* and 20*s.* to his brother and sister: which charge to the brother might continue af-
ter

after the death of the Devisee; and if he should have but an estate for life, his charge should continue longer then his own estate: And so it was adjudged.

Mich. 17 Jacobi, in the Kings Bench.

399.

IN a *Habeas Corpora*, which was to remove two men who were imprisoned in *Norwich*, The Case was this, That within *Norwich* there was a Custom that two men of the said place should be chosen yearly to make a Feast for the Bailiffs; and upon refusal for to do it, that they should be Fined and imprisoned, which two men brought to the Barr by the *Habeas Corpora* were imprisoned for the same cause; it was urged and much stood upon, That the Custom was no good Custom for the causes and reasons which are delivered in *Baggs Case* in *C. 11. part.* But yet at the last the Court did remand them, and held that the Custom might be good.

Mich. 17 Jacobi, in the Kings Bench.

400.

IN an Evidence, in an *Ejectione firme* for Land in the Countie of *Hartford* the Case was this, A man was married unto a woman and died. The wife after 40 weeks and 0 days was delivered with child of a daughter; and whether the said daughter should be heir to her Father, or should be bastard, was the Question; and Sir *William Padde Knight*, and Dr *Montford* Physitians, were commanded by the Court to attend and to deliver their opinions in the Case; who being upon their Oaths, delivered their opinions, That such a child might be a lawfull daughter and heir to her Father; For as well as an *Antenatus* might be heir, viz. a child born at the end of 7 months, so they said might a *Postnatus*, viz. a child born after the 40 weeks; although that 40 weeks be the ordinary time: And if it be objected that our *Saviour Christ* was born at 9 months and five days end, who had the perfection of Nature, To that it may be answered, That that was *miraculum*, & *amplius*. And they held that by many Authorities and by their own Experiences a child might be *Legitimate*, although it be born the last day of the 10th Month after the conception of it, accounting the Months, *per Menses solares*, & *non Lunares*.

Hill. 17 Jacobi, in the Kings Bench.

401. WEBB and PATERNOSTERS Case.

A Man gave Licence unto another to set a Cock of Hay upon his Medow, and to remove the same in reasonable time; and afterwards he who gave the Licence, made a Lease of the Medow to the Defendant, who put his Cattel into the Medow, which did eat the Hay: And for that the Paintiffe brought his Action of Trespafs. And upon Demurrer joyned, the Court was of opinion against the Plaintiffe: For upon the whole matter it appeared, That the said Hay had stood upon the said ground or Medow for 2 years: which the Court held to be an unreasonable time.

Mich. 18 Jacobi, in the Kings Bench.

402. BROWN and PELL's Case.

IN an *Ejectione firme* upon a special Verdict found, the Case was this. *Browne* had issue two Sons, and devised his Lands to his youngest Son and his Heirs; And if it shall happen his said youngest Son to die without issue living his eldest Son, That then his eldest Son should have the Lands to him and his Heirs in as ample manner as the youngest Son had them; The youngest Son suffered a Common Recovery, and died without issue living the eldest Son; The Question was whether the eldest Son or the Recoverer should have the Lands; *Montague, Haughton and Chamberlain* Justices; The same is a Fee-simple Conditional, and no Estate Tail in the youngest Son, *Doddridge* Justice contrarie.

Mich. 18. Jacobi in the Kings Bench.

403. POLLYES Case.

IN an Action of Trespafs, It was agreed by the Court: If 2 Tenants in Common be of Lands upon which Trees are growing, and one
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of them felleth the Trees and layeth them upon his Freehold, If the other entreth into the Land and carrieth them away, an Action of Trespasse *Quare clausum fregit* lyeth against him; because the taking away of the Trees by the first was not wrongfull, but that which he might well do by Law: And yet the other Tenant in Common might have seized them before they were carried off from the Land; But if a man do wrongfully take my Goods, as a Horse, &c. and putteth the same upon his Land, I may enter into his Land and seize my Horse again; But if he put the Goods into his House, in such Case I cannot enter into his House and retake my Goods; because every mans House is his Castle, into which another man may not enter without special Licence.

Hill. 19 Jacobi, in the Kings Bench.

404.

THe Case was, That two Tenants in Common of Lands made a Lease thereof for years rendring Rent, and then one of them died: And the Question was, who should have the Rent; And if the Executor of him who died and the other might joyn in an Action for the Rent; And as this Case was, The opinion of the whole Court was, That the Executor and the other might joyn in one Action for the Rent, or sever in Action at their pleasures. But if the Lease had been made for life rendring Rent; The Court was cleer of opinion that they ought to sever in Actions.

Trin. 20 Jacobi, in the Kings Bench.

405.

A Man was bounden in a Bond by the name of *Edmond*, and his true name was *Edward*. And an Action of Debt was brought against the Executors of *Edmond* upon the said Bond, who demanded *Oyer* of the Bond, and then pleaded that it was not the Deed of their Testator; and issue being thereupon joyned, It was found by Inquest in *London* to be his Deed, viz. the Deed of *Edmond*; And it was moved in Arrest of Judgment, *Quod querens nihil caperet per Billam*; and so it was resolved and adjudged by the Court (*Doddridge* only being absent) And a Case was vouched by *Henage Finch* Recorder of *London*, to prove this case, That it was so adjudged in a Case of Writ of Er-

284 *Sir William Bronker's Case.*

Error brought in the Exchequer-Chamber; in which Case the party himself upon such a Misnomer, and after a Verdict and Judgment given in the same Case, did reverse the Judgment for this Error.

Mich. 14 Iacobi, in the Kings Bench.

406.

VESEY'S Case.

Villiam Vesey was indicted for erecting of a Dove-house. And Serjeant *Harvey* moved, That the Indictment was insufficient: the words were, That the Defendant *erexit Columbare vi & armis ad commune nocumentum, &c.* and that he was not *Domina Manerii nec Rector Ecclesie*. And the Indictment was quashed, because it was not contained in the Indictment that there were Doves in the Dove-cote: For the meer erecting of a Dove.cote, if there be no Doves kept in it, it is no Nuisance, as it was holden by the Justices.

Mich. 15 Iacobi, in the Kings Bench.

407

SIR WILLIAM BRONKER'S Case.

SIR William Bronker brought an Action upon the Case for slanderous Words: And he shewed in his Declaration how that he was a Knight, and one of the Gentlemen of His Majesties Privy-Chamber; And that the Defendant spake of him these scandalous words, viz. *Sir William Bronker is a Cosening Knave, and lives by Cosenage*. Which was found for the Plaintiffe. In arrest of Judgment it was moved that the words were not actionable, And so it was adjudged *per Curiam*.

Pasch. 21 Iacobi, in the Kings Bench.

408.

YATE and ALEXANDER'S Case.

Yate brought an action upon the Case against *Alexander* Attorney of the Kings Bench; and declared, That the Plaintiffe in an action of

of Debt brought against *Alexander* the Defendant who was Executor to his Father, had Judgment to recover against him as Executor, and that he sued forth a *Fieri facias* to the Sheriffe to have Execution: and that before the Sheriffe could come to levy the debt and serve the Execution, the Defendant *A secretè & fraudulenter vendidit, amovit & disposuit* of all the Testators goods, For which cause the Sheriffe was constrained to return *Nulla bona, &c.* *Ley* Chief Justice said, That the Action would well lie, because the Sheriffe could not return a *Devastavit*, because the goods were secretly conveyed away, so as the Sheriffe could not tell whether he had sold or otherwise disposed of the said goods, and also because the Plaintiffe is destitute of all remedy by any other Action. To which *Dodderidge* Justice did agree. But *Haughton* Justice was against it: For he said, That if one be to bring an action of Debt against the Heir, if the Heir selleth the Land which he hath by descent from his ancestors before the action brought, an action upon the Case will not lie against him for so doing. *Dodderidge* said, That the Case which was put by *Haughton* was not like to this Case: For in this Case if the Sheriffe had, or could have returned a *Devastavit*, the action upon the Case would not have lien; But here the Sheriffe hath not returned any *Devastavit*: And the sale being secretly made, the Sheriffe could not safely return a *Devastavit*, for so perhaps he might be in danger of an action upon the Case to be brought against him for making of such a Return. The Case was adjourned tili another day.

Pasch. 21 Jacobi, in the Kings Bench.

409. WILLIAMS and GIBB'S Case.

NOTE in this Case it was said by *Ley* Chief Justice, That whatsoever is allowed for Divine service, or whatsoever cometh in lieu of Tythes and Offerings, the same is now become a thing Ecclesiastical. And *Dodderidge* Justice also said, That no Law doth appoint that the Vicar or Parson should read Divine Service in two severall Parish-Churches, but only the Ecclesiastical Law.

Pasch.

Pasch. 21 Jacobi, in the Kings Bench.

410. STEWRY and STEWRY's Case.

A Bill was exhibited into the Court of Chancery for the traversing of an Office, who found one to be in Ward to the King: and the parties were at issue *super sepeales exitus*; And a *Venire facias* was awarded out of the Chancery returnable in the Kings Bench, directed to the Sheriffe *Quod venire faciat 12 homines triare (placita traversia) super sepeales exitus*. And it was moved, That the several Issues ought to be expressed in the *Venire facias*. Dodderidge Justice, It ought not to be (*Placita traversia*) For it shall never be called *Placitum*, but when it is at the Kings suit. And the opinion of the Court was, That the *Venire facias* should be amended, and that the several Issues should be expressed therein; and *Young's Case 20 Jacobi* was cited for a President in the very point.

Pasch. 21 Jacobi, in the Kings Bench.

411. ASTLEY and WEBB's Case.

IN an *Ejectione Firme* the words (*vi & armis*) were omitted out of the Plaintiffs Declaration: And although this was the default of the Clark, yet the same could not be amended, but it made the Declaration not to be good.

Pasch. 21 Jacobi, in the Kings Bench.

412. WHITE and EDWARD's Case.

IN Trespasse, *Edwards* the Defendant being a Clark of the Chancery, after an Imparance could not be suffered to plead his Priviledge. It was moved in this Case, That the Declaration was *viginti opali vocatè Wythies*; And it was said it should have been (*anglicè*) and not *vocatè*: But the opinion of the Court was, that (*vocatè*) was as good as *anglicè*.
Then

Then it was moved, that the Declaration was, That the Defendant had felled twenty Pearches of Hedging; whereas it ought to have been, that the Defendant had felled a Hedge containing twenty Pearches; for a man cannot cut a Mathematical Pole. But the Court said, That the Declaration was good notwithstanding that; and cited 17 E. 4. 1. where a man sells twenty Acres of Corn, and there Exception was taken to it as it is here, viz. That it ought to have been twenty Acres sowed with Corn: but it was no good Exception there, No more was it as the Court said in this Case; for it is the common speech to say, Twenty perches of hedging, A pint of wine, An acre of corn, &c. And therefore the Declaration was ruled to be good, notwithstanding these Exceptions which were taken to it by Serjeant Headley.

Pasch. 21 Jacobi, in the Kings Bench.

413. BRIDGES and MILL'S Case.

AN action upon the Case was brought for speaking of these words, viz. *Thou (innuendo the Plaintiffe) hast ravished a woman twice, And I will make thee stand in a white sheet for it.* Henden Serjeant moved in arrest of Judgment, That the action would not lie for the words: For he said, That by the Common-Law Rape was not Felony, but Trespass, v. Stamford 23. 6. But now by the Statute of West. 1. cap. 34. it is made Felony: And he said, That the later words, viz. *(stand in a white sheet)* doth mitigate the former words, by reason that in the former words the word *(Felonicie)* was omitted; as the Case is in C. 4. par. 20. *Barbams Case*, where the words *Thou didst burn my Barn*, and did not say, *My Barn full of Corn*, nor that it was parcel of his Mansion-house, and therefore the action would not lie: For unlesse the Barn were full with corn, or part of a dwelling-house, it is not Felony. Like unto *Humfries Case* adjudged in the Common-Pleas, where an action upon the Case was brought for these words, *Thou hast pick'd my Pocket and taken away ten shillings*: And it was adjudged that the action would not lie, For he did not say that he had stolen ten shillings; But if he had said nothing; but *Thou hast pick'd my pocket*, then the action would have been maintainable. *Ley and Dodderidge Justices*, By the Common-Law Rape was Felony, and in the said Statute the word *Felony* is not, although it be used in the Indictment. It was adjourned: But the opinion of the Court seemed to be, That the action would lie for the words.

Pasch.

Pasch. 21 Iacobi, in the Star-Chamber.

414. Sir HENRY FINES Case.

IN the Case of Sir Henry Fines in the Star-Chamber, Exception was taken to one of the Witnesses, viz. to Dr. Spicer, because that he stole Plate, and had been pardoned for it. But notwithstanding the Exception, the Court did allow of the Testimony of the said Dr. Spicer. And then Hobart Chief Justice of the Common-Pleas cited *Cuddingtons Case Hill. 13 Iacobi*, to be adjudged. *Cuddington* brought an action upon the Case for calling him *Thief*: The Defendant justified that such a day and year he stole a Horse: The Plaintiffe replied, That the King had given him a Pardon for all Felonies: And it was adjudged that the Action did lie. Afterwards at another day *Jones* and *Dodderidge* Justices put the Case more largely, viz. *Cuddington* committed Felony 44 *Eliz.* and 1 *Iacobi* by the General Pardon he was pardoned. And they said, That he who procures a Pardon, confesseth himself to be guilty of the offence: But by the general Pardon it is not known whether he be guilty or not: and in *Cuddingtons Case* it was a general Pardon, and that was the cause that the Action did lie, for that it is not known whether he committed the Felony or not. But they conceived that if it had been a particular Pardon, that then in that case the Action would not have been maintainable: For the procuring of a special Pardon doth presuppose, and it is a strong presumption that the party is guilty of the offence. Note, it did not appear in the Case of *Fines* the principal Case, whether the Pardon by which Dr. Spicer was pardoned were a general Pardon, or whether it were a particular and special Pardon.

Pasch. 21 Iacobi, in the Kings Bench.

415. DAVER'S Case.

IN *Davers Case* who was arraigned for the death of *William Dutton*, *Ley* Chief Justice delivered it for Law, That if two men voluntarily fight together, and the one killeth the other, if it be upon a sudden quarell,

quarrel, that the same is but Man-slaughter. And if two men fight together, and the one flieth as far as he can, and he which flieth killeth him who doth pursue him, the same is *Se defendendo*. Also if one man assaulteth another upon the High-way, and he who is assaulted killeth the other, he shall forfeit neither life, nor lands nor goods, if he that killed the other fled so far as he could. *Quod nota.*

Pasch: 21 Jacobi, n the Court of Wards.

416. SIR EDWARD COKE'S CASE.

THis Case being of great consequence and concernment, The Master of the Court of Wards was assisted by four of the Judges in the hearing and debating of it: and after many Arguments at the Barr, the said four Judges argued the same in Court, *viz. Dodderidge* one of the Justices of the Kings Bench, *Tanfield* Lord chief Baron of the Exchequer, *Hobart* Lord Chief Justice of the Court of Common Pleas, and *Ley* Lord Chief Justice of his Majesties Court of Kings Bench: The Case in effect was this: *Queen Elizabeth* by her Letters Patents did grant to *Sir Christopher Hatton* the Office of Remembrancer and Collector of the first Fruits for his life, *Habendum* to him after the death or surrender of one *Godfrey* who held the said Office then in possession; *Sir Christopher Hatton* being thus estated in the said Office in Reversion, and being seised in Fee-simple of diverse Mannors, Lands and Tenements, did Covenant to stand seised of his said lands, &c. unto the use of himself for life, and afterwards to the use of *J. Hatton* his son in tail, and so to his other sons intail; with the Remainder to the right heirs, of *J. Hatton* in Fee, with *Proviso* of Revocation at his pleasure during his life. *Godfrey* the Officer in possession died, and *Sir Christopher Hatton* became Officer and was possessed of the Office, and afterwards he became indebted to the Queen by reason of his said Office; And the Question in this great Case was, Whether the Mannors and Lands which were so conveyed and settled by *Sir Christopher Hatton*, might be extended for the said Debt due to the Queen, by reason of the *Proviso* and Revocation in the said Conveyance of Assurance of the said Mannors and Lands, the debt due to the Queen was assign'd over, and the Lands extended, and the Extent came to *Sir Edward Coke*, and the heir of *John Hatton* sued in the Court of Wards to make void the Extent: And it was agreed by the said four Justices, and so it was afterwards decreed by *Cranfield* Master of the Court of Wards, and the whole Court, That the said Mannors and Lands were liable to the said Extent.

And Dodderidge Justice who argued first, said that the Kings Majestie had sundry prerogatives for the Recovery of Debts and other Duties owing unto him: First he had this prerogative, *ab origine legis*, That he might have the Lands, the Goods, and the Body of the Person his Debtor in Execution for his Debt. But at the Common Law a common person; a common person could not have taken the body of his debtor in execution for his debt: but the same priviledg was given unto him by the Statute of 25. E. 3. cap. 17. At the Common Law he said that a common person Debtee might have had a *Levari facias* for the Recovery of his Debt, by which Writ the Sheriffe was commanded *Quod de terris & Catallis ipsius*, the Debtor, &c. *Levari faciat*, &c. but in such Case the Debtee did not meddle with the Land, but the Sheriffe did collect the Debt and pay the same over to the Debtor: But by the Statute of West. 2. cap. 20. The Debtee might have an *Elegit*, and so have the moyetie of the Lands of his Debtor in Execution for his Debt, as it appeareth in C. 3. part. 12. in Sir William Harbours Case.

Secondly, He said, That the King had another prerogative, and that was, to have his Debt paid before the Debt of any Subject, as it appeareth 41. E. 3. Execution 38. and Pasc. 3. Elizabeth. Dyer. 197. in the Lord Daves and Lassells Case, and in M. 3. E. 6. Dyer, 67. Stringfellow's Case: Forther the Sheriffe was amerced, because the King ought to have his Debt first paid, and ought to be preferred before a Subject *vid.* 328 Dyer, There the words of the Writ of Priviledg shew that the King is to be preferred before other Creditors: By the Statute of 33. H. 8. cap. 39. The Execution of the Subject shall be first served, if his Judgment be before any Proesse be awarded for the Kings debt. In the Statute of 25. E. 3. Cap. 19. I find that by the Common Law, the King might grant a Protection to his Debtor that no other might sue him before that the King was satisfied his debt. See the Writ of Protection, Register 281. B. the words of which are, *Et quia nolumus solutionem debitorum nostrorum ceteris omnibus prout ratione Perogativa nostra totis temporibus retroactis usitata*, &c. But that grew such a Grievance to the Subject, that the Statute of 25. E. 3. Cap. 19. was made. And now by that Statute a common person may lawfully sue to Judgment, but he cannot proceed to Execution (and so the Kings Prerogative is saved) unless the Plaintiff who sueth will give security to pay first the Kings Debt: For otherwise if the Paty doth take forth Execution upon his Judgment and doth levy the money, the same money may be seized upon to satisfy the Kings Debt, as appeareth in 45. E. 3. title *Decies tantum* 12.

The third Prerogative which the King hath, is That the King shall have the Debt of the Debtor to the Kings Debtor paid unto him. v. 21 H. 7. 12. The Abbot of Ramsey's Case. The Prior of Ramsey was indebted.

debted to the King, and another Prior was indebted to the Prior of *Ramsay*: and then it was pleaded in Barr, that he had paid the same Debt to the King, and the Plea holden for a good Plea. And if Rent be due and payable unto me by my Lessee for years, the same may be taken for the Kings Debt, and the special matter shall be a good barr in an *Avowry* for the Rent, 38. E. 3. 28. A Prior Alien was indebted to the King for his Farm Rent: And being sued for the same, he shewed, That there was a Parson who held a certain portion of Tythes from him which were part of the Possessions of the same Priory, which he kept in his hands, so as he could not pay the King his Farm-Rent unlesse he might have those Tythes which were in the Parsons hands Wherefore a Writ was awarded against the Parson to appear in the Exchequer, and to shew cause why he should not pay the same to the King for the satisfying of the Kings Rent: And there *Skipwith* Justice said, That for any thing which toucheth the King and may turn to his advantage to hasten the Kings business, that the Exchequer had jurisdiction of it, were it a thing Spiritual or Temporal. V. 44 E. 3. 42, 44. the like Case, but there it is of a Pension; And the Case of 38 Aff. 20. was the Case for Tythes: See also 12 E. 3. *Swalds* Case to the same purpose. If two Coparceners be in ward to the King, upon a suggestion that one of them is indebted to the King, the staying of his Livery shall be for his moytie untill the King be satisfied his debt; but the other sister shall have Livery of the other moytie which belongs unto her, *Fitz. N. 5. 263. a. Mich 19 E. 3. and Hill. 20. E. 3.* which was one and the same Case. The Kings Debtor brought a *Quo minus* in the Exchequer against his Debtor: the Defendant appeared, And the Plaintiffe afterwards would have been Nonsuit, but the Court would not suffer him so to be: And it was there said, That a Release by the Kings Debtor unto his Debtor would not discharge the Kings Debtor as to that Debt. In a *Quo minus* in the Exchequer upon a Debt upon a simple Contract, the Defendant cannot wage his Law, because the King is to have a benefit by the suit, although the King be no party to the suit, *C. 4. par. 95.*

The fourth Prerogative which the King hath, is, That the King shall have an Accompt against Executors, because the Law there maketh a privy; it being found by matter of Record, that the Testator was indebted to the King, which Record cannot be denied. But in the Case of a common person an Accompt will not lie against Executors for want of privy. The Accompt which the King brings is *ad computandum ad Dominum Regem, &c.* without setting forth how the party came liable to accompt: But a common person in his accompt brought ought to shew how that the party was Receiver, Bailiff, &c. If a man doth entermeddle with the Kings Treasure (the King pretending a title to it) he shall be chargeable for the same to the King, *C. 11. part 89.* the Earl of *Devonshire's* case. The Master of the Ordinance pretending that the old broken

and unserviceable Ordnance belonged unto him by reason of his Office, procured a Privy-seal, &c. and afterwards disposed of them to his own use, and dyed: And his Executor was forced to accompt for them. *Sir Walter Mildmay's Case, Mich. 37. & 38 Eliz. Rot. 312.* in the Exchequer. *Sir Walter Mildmay* was Chancellor of the Exchequer, and suggested unto the Lord Treasurer of England, That his Office was of great attendance, and desired the Lord Treasurer that he would be pleased to allow unto him 100*l.* for his dyer, and 40*l.* *per annum* for his attendance; which the Lord Treasurer did grant unto him, and he enjoyed it accordingly, and afterwards dyed, and his Executors were forced to accompt for it, and to pay back the mony for all the time that their Testator received it. *C. 11. part. 90, 91.* there is cited, That *Sir William Cavendish* was Treasurer of the Chamber of King *H. 8. E. 6.* and Queen *Mary*, and that he was indebted to *K. E. 6.* and to *Q. Mary*; and that being so indebted he purchased divers iands, and afterwards aliened them, and took back an estate therein to himself and his wife, and afterwards dyed without rendring any Accompt: the Terre-Tenants of the land were charged to answer to *Q. Elizabeth* for the monies, to which they pleaded the Queens special Pardon; and it was in conclusion said, That the Pardon was a matter of grace *ex gratia*, but in Law the Terre-Tenants were chargeable to the said Queen for the monies, *v. Com. 321. 5 Eliz. Dyer 244, 245.* in the Exchequer, *Mich. 24. E. 3. Rot. 11. ex parte Rememb. Regis. Thomas Farel* Collector of the Fifteenths and Tenths, being seised of lands in Fee, and being possessed of divers goods and chattels, at the time when he entred into the said Office (being then indebted to the King) did alien them all, and afterwards dyed without heir or Executor: And a Writ went out unto the Sheriffe to enquire what lands and tenements goods and chattels he had at the time he entred into the said Office; and Processe issued forth against the Terre-Tenants and the Possessors of his goods and chattels *ad computand. pro collectione predict. & ad respondendum & satisfaciendum inde Domino Regi, V. Dyer, 160, 50 Ass. 5.* A notable Case to this purpose, *Mich. 30. E. 3. rot. 6. William Porter* Mint-Master did covenant with the King by Indenture enrolled, That for all the Bullion which should be delivered *ad Cambium Regis pro Moneta faciend.* that mony should be delivered for it within eight dayes: which Covenant he had broken, and therefore the King paid the Subject for the Bullion: And afterwards because *John Walweyen* and *Richard Piccard duxerunt & presentaverant dist. William Porter* in officium illud tanquam sufficientem, (and that they offered to be Sureties for him, but were not accepted of) which they did confesse; *Ideo consideratum est quod predict. Walweyen & Piccard onerentur erga Dominum Regem:* And they afterwards were charged to satisfie the King for all the monies which the King had paid for the said Porter: And although that none of the Kings treasure came to their

their hands, nor they had not any benefit as appeared by any matter in the Case, yet because they were the means and causers that the King sustained damage and losse, they were adjudged to be chargeable to the King, C.11. par. 92. this Case is there cited.

Upon these Cases vouched by me, I make divers Observations. 1. I observe, That from Age to Age what care the Judges had for the advancing and the recovering of the Kings Debts; because *Theſaurus Regis eſt vinculum Pacis & Bellorum nervus*, And it is the flowing fountain of all bounty unto the Subject. 2. I observe, That the King hath a Prerogative for the Recovery of Debts due unto him. 3. I observe, That although the Debt due to the King be puisne or the lesser Debt, and although the Debtor be able and sufficient to pay both Debts, viz. the Kings Debt and the Debt owing to the Subject, yet the Kings Debt is to be first paid.

Now to apply these cases to the Case in question Here is a Subject who is indebted to the King; And I say, That the Lands which such a Debtor hath in his power and dispose (although he hath not any Estate in the Lands) shall be liable to pay the Debt to the King: And I say, That Sir Christopher Hatton had a Fee in the Mannors and Lands in this case; And although he did convey them *bona fide*, yet untill his death by reason of the *Proviso* of Revocation they were extendable. *Trin. 24. E. 3. Rot. 4. Walter de Chirton* Customer, who was indebted to the King for the Customs, purchased Lands with the Kings monies; and caused the Feoffors of the Lands to enfeoff certain of his friends, with an intent to defraud and deceive the King; and notwithstanding he himself took the profits of the Lands to his own use: And those Lands upon an Inquisition were found, and the values of them, and returned into the Exchequer; and there by Judgment given by the Court the Lands were seized into the Kings hands, to remain there untill he was satisfied the Debt due unto him; And yet the Estate of the Lands was never in him: But because he had a power, viz. by *Subpena* in Chancery to compell his Friends to settle the Estate of the Lands upon him, therefore they were chargeable to the Debt. You will say perhaps, there was Covin in that Case: But I say, that neither Fraud, Covin, nor Collusion is mentioned in the Report in *Dyer 160. C. 11. par. 92.* And that Case was a harder Case then our Case is: For *Walter de Chirton* in that Case was never seised of the said lands: But in our Case Sir Christopher Hatton himself had the lands; And when he had the lands he was assured of the Office, although he had not the possession of it, For he was sure that no other could have it from him, and no other could have it but himself. And for another cause, our Case is a stronger Case then the Case of *Walter de Chirton*: For *Chirton* had no remedy in Law to have the lands; but his remedy was only in a Court of Equity, and a remedy in Conscience only: But in our Case, Sir Christopher Hatton had a time in which

which he might let the land to passe, and yet he had a power to pull it back again at his pleasure: So as he had the disposition of it; but before the alteration of the uses he dyed: And if he had been living (being indebted to the King) the King might have extended the lands, because that then he had the possession of them. There were two Considerations which moved Sir *Christopher Hatton* to Convey the Lands: the first was honorable, viz. For the payment of his Debts; the second was natural, viz. For the preferment of his Children. Although the Conveyance of the Lands for payment of his Debts was but for years, yet the same was too short, like unto a Plaster which is too short for the sore: For the Covenanters were not his Executors, and so they were not liable to Debts: And although he be now dead and cannot revoke the former uses, yet he had the power to revoke the uses during his life; And so he was chargeable for the Debt due to the King.

Tanfield Chief Baron agreed with Justice *Dodderidge* in all as before: And he said, That all powerful and speedy courses are given unto the King for the getting in of his Revenues; and therefore he said he had the said Prerogatives as have been recited: And in 25 E.3. in *libro rubro* in the Exchequer, there the Foundations of the said Prerogatives do appear. If a common person arrest the body in Execution, he shall not resort to the lands, *contr.* to *Blumfields Case*, C. 5. par. The course of the Exchequer makes a Law every where for the King. If any Officer be indebted unto the King and dyeth, the course of the Exchequer is, For to call in his Executors or the Heir, or the Terre-Tenants to answer the Debt; and if he hath no lands, then a Writ issueth out of the Exchequer to know what goods he had, and to whose hands they be come. All Inquisitions concerning Lands in the like Cases are, *Habuit vel seiscitus*; and not that he was seised onely. The word *Habuit* is a large word, and in it is contained a disposing power. But in this Case Sir *Christopher Hatton* had a power every day to revoke the uses; And when he had once revoked them, then was he again as before *seiscitus*. 7 H. 6. in the Exchequer, the Kings Farmor had Feoffees to his use, and dyed indebted to the King: And upon an Inquisition it was found that (*Habuit*) for he had them in his power by compelling his Feoffees by Equity in Chancery; and therefore it was adjudged that the King should have the Lands in the Feoffees hands in extent. But in this case Sir *Christopher Hatton* might have had the Lands in him again without compulsion by a Court of Equity, for that he had power to revoke the uses in the Conveyance at his pleasure. Mich. 30. H. 6. rot. in the Exchequer: A Clark of the Court was assigned to receive monies for the King, who had Feoffees of lands to his use: And the lands were found and seised for the Kings monies, by force of the word *Habuit*. 32 H. 6. *Philip Butler's Case*, who was Sheriffe of a County, being indebted to the King; his Feoffees were chargeable to the Kings debt by force of the

the word *Habuit*, For *habuit* the lands in his power. 6 E.4. *Bowes Case* acc. 34 H.6. A widow being indebted to the King, her Feoffees were chargeable to pay the Kings debt, because she had power of the lands, It being found by Inquisition that *habuit*. 1 R.3. the like Case. And 24 Eliz. in *Morgan's Case* it was adjudged, That lands purchased in the names of his Friends for his use, were extended for a debt due by him to the King.

Hobart Lord Chief Justice of the Common Pleas argued to the same purpose, and agreed with the other Justices; and he said in this case it was not material whether the Inquisition find the Deed to be with power of Revocation; For he said that the Land is extended, and that the extent remains good untill it be avoided: And he said that a revocable Conveyance is sufficient to bind the Parties themselves, but not to bind the King; but the Lands are lyable into whose hands soever they come. When a man is said to forfeit his body, it is not to be intended his life, but the freedom of his body, Imprisonment At the Common Law a Common person could neither take the bodie nor the Lands in Execution; But yet at the Common Law a *Capias* lay upon a force, although it did not lie in case of Debt, Agreement, &c. The King is *Parvus Legum*, because the Laws flowed from him: he is *Maritus Legum*, For the Law is as it were under *Covert Baron*; he is *Tutor Legum*, for he is to direct the Laws, and they desire aid of him: And he said that all the Land of the Kings Debtor are liable to his Debt. The word (*Debitor*) is *nomen equivocum*, and he is a Debtor who is any ways chargeable for Debt, Damages, Dutie, Rent behind, &c. The Law amplifies evry thing which is for the Kings benefit, or made for the King. If the King releaseth all his Debts, he releaseth only debts by Recognizance Judgment, Obligation, Specialtie or Contract: Every thing for the benefit of the King shall be taken largely, as every thing against the King shall be taken strictly; and the reason why they shall be taken for his benefit is because the King cannot so nearly look to his particular, because he is intended to consider *ardua regni pro bono publico*. The Prerogative Law is not the Exchequer Law, but is the Law of the Realm for the King, as the Common Law is the Law of the Realm for the Subject: The Kings Bench is a Court for the Pleas of the Crown, The Common Pleas is for Pleas betwixt Subject and Subject, and the Exchequer is the proper Court for the Kings Revenues, 13. E.4.6. If the King hath a Rent-charge, he by his Prerogative may distrein in any the Lands of the Tenant, besides in the Lands charged with the Rent, 44. E. 3. 15. although that the partie purchaseth the Lands after the Grant made to the King, but then it is not for a Rent, but as for a dutie to the King: And the King in such case may take the Body Lands and Goods in Execution. See the Lord *Norrbys Case*, *Dyer*. 161. where a man became Debtor to the King upon a simple Contract. N. When he was Chaacellor of the

the Augmentation received a Warrant from the Privy Council, testifying the pleasure of King *E. 6.* That whereas he had sold to *R.* &c. That the said Chancellor should take Order and see the delivery of &c. and should take Bond and Sureties for the King for the payment of the money; By force of which Warrant, he sent one *T.* his Clark to take a Bond of *W.* for the payment of the money, and he took Bond for the King accordingly, and brought the same to the Chancellor his Master, and delivered the same to him to the Kings use; and presently after he delivered the same back to *T.* to deliver over to the Clark of the Court, who had the charge of the keeping of all the Kings Bonds and Specialties: And when *T.* had received the same back, he practised with *R.* and *W.* to deliver them the Bond to be cancelled, and so it was done, and cancelled: And it was holden in that Case, because that the said Bond was once in the power and possession of *N.* that he was chargeable with the Debt: But the Queen required the Debt of *R.* and *W.* who were able to satisfy the Queen for the same.

In *Mildmay's* Case cited before, there it was holden, That the Queen might take her Remedy either against the Parties who gave the insufficient Warrant, or against *Mildmay* himself at her Election. So a man (he said) shall be lyable for damages to the King, for that is taken to be within the word (*Debitor*.) In *Porters* Case cited before, there was neither Fraud, Covin, nor Negligence, and yet the persons who presented *Porter* to the King to hold the Office were chargeable for his negligence, whom they preferred to be Master of the Mint. But in that Case, The Bodie and Goods of *Porter* were delivered to his Sureties as in Execution, to repay them the monie which the King had levied of them. These Cases prove that the word (*Debitor*) is taken in a large sense: That the King shall have for the Debts due to him, the Bodie, Goods and Lands in Execution. The word (Goods) doth extend to whatsoever he hath, 11. *H. 7. 26.* The King shall have the Debt which is due to his Debtor upon a simple Contract, and therein the Debtor of the Debtor shall not wage his Law: For after you say that you sue for the King, it is the Kings Debt, and the King if he please may have Execution of it. An *Ejectione firme* was brought in the Exchequer by *Garraway* against *R. T.* upon an Ejectment of Lands in *Wales*; and it was maintainable in the Exchequer, as well as a Suit shall be maintainable here for an Intrusion upon Lands in *Wales* upon the King himself: and the King shall have Execution of the thing, and recover Damages, as he shall in a *Quo minus*, in satisfaction of a Debt which is due by his Debtor to the King: 8. *H. 5. 10.* There the Kings Debtor could not have *Quo minus* in the Exchequer; The Case there was, That a man Indebted to the King was made Executor, and by a *Quo minus* sued one in the Exchequer who was indebted unto his Testator upon a simple Contract, as for his proper debt; and the *Quo minus* would

would not lie, because the King in that Case could not sue forth Execution: and every *Quo minus* is the Kings Suit, and is in the name of the King, 38. *Aff.* 20. A Prior Alien was arrear in Rent to the King, The Prior brought a *Quo minus* in the Exchequer against a Parson for detaining of Tythes, (here is a variance of the Law and the Court; for the Right of Tythes ought to be determined by the Ecclesiastical Law) and it was found by Verdict for the Prior. A Serjeant moved, That the Court had not jurisdiction of the Cause; To whom it was answered, that they had and ought to have Jurisdiction of it: For that when a thing may turn to the advantage of the King and hasten his business, that Court had Jurisdiction of it; and divers times the said Court did hold jurisdiction in the like Case: and thereupon issue was joyned there, and the Reporter made a *minus* of it; But it seems the Reporter did not understand the Kings Prerogative: For it is true, That such Suit for Tythes doth not fall into the Jurisdiction of the Kings Bench, or Common Pleas; but in the Exchequer it is otherwise; And if the Suit be by *Quo minus*, it is the Kings Suit.

At a common persons Suit the Officer cannot break the house and enter, but at the Kings Suit he may: And a common person cannot enter into a Liberty, but the King may if it be a common Liberty: But for the most part when the King granteth any Liberty, there is a clause of Exception in the Grant; That when it shall turn to the prejudice of the King, as it may do in a special Case, there the King may enter the Liberty; and a house is a Common Liberty, and the Execution of Justice is no wrong when it is for the King. The King hath the precedency for the payment of his Debts to him, as it appeareth in *Stringfellow's* Case cited before by Justice *Dodderidge*: And when Lands are once lyable to the payment of the Kings debts, let the Lands come to whom you will, yet the Land is lyable to his debt, as it appeareth in *Cavendishes* Case, *Dyer* 224, 225. which was entred *Pasc.* 2. *Eliz.* *Ror.* 111. in the Exchequer, 50. *Aff.* 5. A man bindeth himself and his heirs and dieth, and the heir alieneth the Land; the Land is discharged of the Debt as to the Debtee; But in the Kings Case, if at any time the Land and Debt meet together, you cannot sever them without payment of the Kings debt. *Vid. Littleton*: Executors, and soe Administrators are chargeable in an Account to the King: and the Sayings of Mr. *Littleton* are adjudged for Law, and are Judgments: A sale in Market over, nor a Fine and *Nonclaim* shall not bind the King; and so it is of things bought of the Kings Villeyn, because *Nullum tempus occurrit Regi*: A common person in London, by Custom may attach a Debt in anothers hands: As he may come into Court and shew that his debtor hath not any thing in his hand to satisfie his debt, but only that debt which is in the hands of another man; and that Custom is allowable and reasonable.

sonable: And if it shall be reasonable for a Subject so to attach a Debt, will you have it unreasonable for the King? Before the Statute of 25. E. 3. cap. 19. The King might protect his Debtor: as it appeareth by the Register, 281. and Fitz. 28. 6. But the Statute of 25. E. 3. gave the Partie a liberty to proceed to Judgement, but doth barr him from taking forth of Execution upon the Judgment, untill the King be satisfied his Debt. In *Dyer* 296, & 297. a man condemned in the Exchequer for a Debt due to the Queen, was committed to the Fleet, and being in Execution he was also condemned in the Kings Bench at the Suit of a Subject upon a Bill of Debt in *Custodia Mariscalli Mariscalie*: Afterwards upon prayer of the Partie, a *Habeas Corpus cum causa* was awarded out of the Kings Bench to the Warden of the Fleet, who returned the Cause *ut supra*, and he was remanded to the Fleet in Execution for the Debt: Afterwards a Command was given by the Lord Treasurer upon the Queens behalf, to suffer the Prisoner to go into the Countrey to collect and levie monie, the sooner to pay the Queen her Debt: In that Case the Subject brought an Action of Debt against the Warden of the Fleet upon the Escape, who justified the Escape by the said Commandment; It was holden in that case, That although the Partie was in Execution for both the Debts, yet before the Queen was satisfied, the Execution for the Subject did not begin: For the King cannot have equall to have interest in the Body of the Prisoner *Simul cum illo*: But if the Case were as *Lassels* case, 31. *Elio. Dyer*, then he might be in Execution for the King, and for the Subject.

Lassels was taken in Execution at the Suit of a Subject, and before the Writ was returned, a Writ for the Queen came to the Sheriffe, and *Lassels* was kept in Execution for the Queen: In that case *Lassels* was in Execution for them both, viz. the Queen and the Subject: So there is a difference where the Partie is first taken for the King, and where he is first taken for the Subject.

Now I will consider of the Case at Barr; Whether the Land might be extended notwithstanding the Conveyance made: The Kings Debt is to be taken largely, and so Goods in such case are to be taken largely, and so is it likewise of Lands, viz. any Land, be it Land in Use, upon Trust, by Revocation. By the Law, Debts are first to be paid, then Legacies, then childrens preferments; There is a difference where the Land was never in the man, and where it was once in him, C. 8. part. 163. *Might's Case*: *Might* purchased lands to him and to his heirs: It was resolved that this original Purchase could not be averred to be by Collusion, to take away the Wardship, which might accrue after the death of *Might*, for they were Joynts, and the survivor shall have the whole: Note, that there was no fraud, for that it was never in him; but if it had once been the Lands only of *Might*, and then *Might* had made the conveyance to him and his heir, then it would have been fraud

to have deceived the King of the Wardship. In the Case at Barr, *Hart* hath not aliened the land. For an Alienation is, *alienum factum*; and here he hath not made it the land of another, having a power of Revocation. Sir *John Packington* Mortgaged his lands for 100*l*. The Mortgagee enfeoffed *W.* and within the time of Redemption, *Packington* and he to whom the money was to be paid, agreed that *Packington* should pay him 30*l*. of the said 100*l*. and no more; and yet in appearance for the better performance of the Condition, it was agreed that the whole 100*l*. should be paid, and that the residue above 30*l*. should be repaid back to *Packington*, which was done accordingly. It was resolved in that Case, that the same was no performance of the Condition, because it was not a payment *animo solvendi*: And so in this Case there was not any alienation *animo alienandi*: For Sir *Christopher Hatton* gave the Lands, but yet he kept the possession, and received the profits of them; And if Sir *Christopher Hatton* had given the land with power of Revocation, or reserving as in this Case he did an Estate for his own life, it had been all one. If a man deviseth the profits of such lands, the lands themselves do pass. And a Conveyance of lands upon Condition not to take the profits, is a void condition in Law, *Litt.* 462, 463. A Feoffment is made upon confidence, and the Feoffor doth occupie the land at the will of the Feoffees, and the Feoffees do release unto the Feoffor all their right, *Litt.* 464. there it was said that such a Feoffor shall be sworn upon an Inquest, if the lands be of the value of 40*s*. per annum, and that by the Common Law; Therefore it seemeth that the Law doth intend, That when a man hath Feoffees in Trust, that the lands are his own; and then if in such case the Commonwealth shall be served, shall not the King who is *Pater reipublice* be served, so as he may be satisfied his debts? If the Case of *Walter de Chirton* had never been, yet I should now have the same opinion of the Law in such Case as the Judges then had. The King is not bound by Estopels, nor Recoveries had betwixt strangers, nor by the fundamental Jurisdiction of Courts, as appeareth 38. *Aff.* 20. where a Suit was for Tythes in the Exchequer, being a meer spiritual thing; and shall he be bound by a Conveyance? Anno. 16. *H.* 6. then in the time of Civil War Uses began; and of Lands in use the Lord Chief Baron *Tanfield* in his Argument hath cited diverse cases where the lands in use were subject and lyable to the debt of *Cestuy que use* in the Kings Case, and so was it untill the Statute of 27. *H.* 8. of Uses was made. *Babbington*, an Officer in the Exchequer, had lands in the hands of Feoffees upon Trust, and a Writ issued out, and the lands were extended for the Debt of *Babbington* in the hands of his Feoffees. Sir *Robert Dudley* having lands in other mens hands upon Trusts, the lands were seized into the Kings hands for a contempt (and not for debt or damages to the King;) And in this Case, although that the Inquisition do find the Conveyance, but have not found it to be with power of

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Revocation; yet the Land being extended, it is well extended untill the contrary doth appear, and untill the extent be avoided by matter of Record, viz. by Plea, as the Lord Chief Baron hath said before.

By Chief Justice of the Kings Bench argued the same day, and his Argument in effect did agree with the other Justices in all things, and therefore I have forborne to report the same at length. And it was adjudged, That the Extent was good, and the Land well decreed accordingly.

Pasch. 21 Jacobi, in the Exchequer-Chamber.

417. *The Lord SHEFFIELD and RATCLIFF'S Case.*

IN a Writ of Error brought to reverse a Judgment given in a *Monstrans de Drois* in the Court of Pleas, The Case was put by *Glanville* who argued for *Ratcliffe* the Defendant, to be this. 2 E. 2. *Malew* being seised of the Mannor of *Mulgrave* in Fee, gave the same to *A. Bigot* in tail, which by divers discent came to Sir *Ralph Bigot* in tail, Who 10 *Jannarii* 6 H. 8. made a Feoffment unto the use of his last Will, and thereby after his Debts paid declared the use unto his right heirs in Fee, and 9. H. 8. dyed. The Will was performed: *Francis Bigot* entred being Tenant in tail, and 21 H. 8. made a Feoffment unto the use of himself and *Katherine* his wife, and to the use of the heirs of their two bodies. Then came the Statute of 26 H. 8. cap. 13. by which Tenant in tail for Treason is to forfeit the Land which he hath in tail. Then the Statute of 27 H. 8. of Uses is made. Then 28 H. 8. *Francis Bigot* did commit Treason, And 29 H. 8. he was attainted and executed for the same. Anno 31 H. 8. a private Act of Parliament was made, which did confirm the Attaindor of *Francis Bigot*, and that he should forfeit unto the King (word for word as the Statute of 26 H. 8. is) saving to all strangers except the Offendor and his heirs, &c. 3 E. 6. The heir of *Francis Bigot* is restored in blood, *Katherine* entred into the Mannor and dyed seised: 8 Eliz. their Issue entred, and married with *Francis Ratcliffe*, and had Issue *Roger Ratcliffe*, who is heir in tail unto *Ralph Bigot*, And they continue possession untill 33 Eliz. And then all is found by Office and the Land seised upon for the Queen, who granted the same unto the Lord *Sheffield*. *Francis Bigot* and *Dorothy* die, And *Roger Ratcliffe* sued a *Monstrans de Drois* to remove the Kings hands from off the lands, and a *Scire facias* issued forth against the Lord *Sheffield* as one of the Terre-Tenants, who pleaded all this special matter; and Judgment was thereupon

only 2 out of 1000 being returned & sent in the last and after taking the last for treason

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upon given in the Court of Pleas for *Roger Ratcliff*; And then the Lord *Sheffield* brought a Writ of Error in the Exchequer-Chamber to reverse the said Judgment: And *Finch* Serjeant argued for the Lord *Sheffield* that the Judgment ought to be reversed; And now this Term *Glanville* argued for *Roger Ratcliff*, that the Judgment given in the Court of Pleas ought to be affirmed.

There are two points: The first, If there were a Right remaining in *Francis Bigot*, and if the same were given unto the King by the Attaindor and the Statute of 31 H.8. Second, If a *Monstrans de Droit* be a proper Action upon this matter, which depends upon a Remitter; for if it be a Remitter, then is the Action a proper Action: The Feoffment by *Ralph Bigot* 6 H.8. was a Discontinuance, and he had a new use in himself, to the use of his Will, and then to the use of his Heirs: Then 9 H.8. *Ralph Bigot* dyed, And then *Francis Bigot* had a right to bring a Formedon in the Discendor to recover his estate tail. 21 H.8. (then the point ariseth) *Francis Bigot* having a right of Formedon, and an use by force of the Statute of 1 R.3. cap. 1. before the Statute of 27 H.8. by the Feoffment he had so settled it, that he could not commit a forfeiture of the estate tail. When a man maketh a Feoffment, every Right, Action, &c. is given away in the Livery and Seisin, because every one who giveth Livery giveth all Circumstances which belongs to it: For a Livery is of that force, that it excludes the Feoffor not only of all present Rights, but of all future Rights and Tytles; v.C.1. par. 111. and there good Cases put to this purpose. 9 H.7. 1. By Livery, the Husband who was in hope to be Tenant by Courtesie, is as if he were never seised. 39 H. 6. 43. The Son disseiseth his Father, and makes a Feoffment of the lands; the Father dyeth, the hope of the heir is given away by the Livery.

It was objected by Serjeant *Finch*, 1. Where a man hath a right of action to recover land in Fee or an estate for life which may be conveyed to another, there a Livery doth give away such a Right, and shall there bind him: But an estate in tail cannot be transferred to another by any manner of Conveyance, and therefore cannot be bound by such a Livery given. I answer, It is no good Rule, That that which doth not passe by Livery, doth remain in the person which giveth the Livery: 19 H.6. Tenant in tail is attainted, Office is found; The estate tail is not in the King, is not in the person attainted, but is in abeyance: So it is no good Rule which hath been put. When Tenant in tail maketh a Feoffment, *Non habet jus in re, neque ad rem*: If he have a Right, then it is a Right of Entre, or Action; but he cannot enter nor have any action against his own Feoffment, 19 H.8. 7. *Dyer*. If Discontinuee of Tenant in tail levieth a Fine with proclamations, and the five years passe, and afterward Tenant in tail dyeth, his issue shall have other five years, and shall be helped by the Statute, for he is the first to whom the right doth accrue after the Fine levied; for Tenant in tail himself after his Fine with
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Proclamations hath not any right: But if Tenant in tail be disseised, and the Disseisor levieth a Fine with proclamations, and five years passe, and afterwards Tenant in tail dyeth, there the issue in tail is barred; for there after the Fine levied the Tenant in tail himself had right, so as the issue in tail was not the first to whom the Right did accrue after the Fine levied, *C. 3. part 87. Com. 374. a.* When *Ralph Bigot* made the Feoffment *6 H. 8. Francis Bigot* had a Right; by his own Feoffment *21 H. 8.* his Right was extinguished.

The second Objection was upon the Form of pleading in a *Formedon*, viz. *Post cujus mortem descendere debet* to him, viz. the issue. Then the Ancestor had such a Right, which after his death might have descended to his issue; Then that proveth that the Ancestor by his Feoffment hath not given away all the Right. I answer, The form is not *Post cujus mortem*, but *Per cujus mortem*; and the *Post cujus mortem descendere debet* is not traversable; and therefore it is but matter of form, and not of substance. *Old Entries 240.* One *dum non fuit compos mentis* maketh a Feoffment, he shall not avoid the Feoffment, because that the Law doth not allow a man to stultifie himself, *C. 4 part 123.* But his heir after his death may avoid the Feoffment of his Ancestor; for *de ipso descendit jus*, although the Father had not a Right in his life.

It was thirdly objected out of *C. 4. part 166. b.* where it is said, That if an Ideot maketh a Feoffment, the King shall avoid the same after Office found. I answer, That the Book it self doth clear the objection: For it is in regard of the Statute of *Prerogativa Regis, cap. 9. Ita quod nullatenus per eosdem fatuos alienentur, &c.* and not in respect of any Right which the party hath who maketh the Feoffment. By the Common Law, Tenant in tail, viz. He who had a Fee-simple conditional, had not any right after his Feoffment: Then the Act of *West 2 cap. 1.* makes such a Fee an Estate in tail, and provides for the issue in tail, for him in the Remaindor or in Reversion, but not for the party who made the Feoffment or Grant; for a Grant of Tenant in tail is not void as to himself. *Magdalen-Colledge Case*; A Lease by a Parson is good against himself, but voidable against his Successor: And so the same is no Exception, *Discendit jus post mortem, &c.*

The fourth Objection was, That although Tenant in tail had made a Feoffment, yet he remained Tenant to the Avowry of the Donor, and therefore some right of the old estate tail did remain in him. I answer, *5 E. 4. 3. a. 48 E. 3. 8. b. 20 H. 6. 9. 14 H. 4. 38. b. C. 2. part 30. a.* The matter of the Avowry doth not arise out of the Right or Interest which a man hath in the Land, but out of the Privy: As when the Tenant maketh a Feoffment, he hath neither right nor interest in the Land, yet the Lord is not compellable to avow upon the Alienee before notice. In a *Precipe quod reddat* the Tenant alieneth, yet he remaineth Tenant as to the Plaintiffe, and yet he hath not either a Right or any Estate as to the Alienee.

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The fifth Objection was upon the Statute of 1 R. 3. cap. 1. All Feoffments &c. by *Cestuy que use* shall be effectual to him to whom it was made against the Feoffor and his heirs. I answer, The words of the Statute are to be considered, *All Feoffments*, &c. I desire to know how this affirmative Law doth take away the power of the Feoffees: And the Feoffees are bound by the Feoffment of *Cestuy que use*, and are seised to the use of such Alienees. 27 H. 8. 23. b. by Fitzherbert: If *Cestuy que use* enter and maketh a Feoffment with warrantie, &c. but there are not words that the old rights are given away. The Feoffees to use before the Statute of 1 R. 3. c. 1. might only make Feoffments; but after that Statute *Cestuy que use* might also make Feoffments of the Lands: And so the Statute of 1 R. 3. did not take away the power of the Feoffees, for they yet may make Feoffments; but it did enlarge the power of *Cestuy que use*, Com. 351, 352. Then the Question further riseth: If Francis Bigot had any Right in the Tail which might be forfeited by the Statutes, by 26 H. 8. and 31 H. 8. A particular Act made for the Attaindor of the said Francis Bigot. From the time of West. 2. cap. 1. untill the Statute of 26 H. 8. cap. 13. there were many Bills preferred in Parliament to make Lands which were entailed to be forfeited for high Treason; but as long as such Bills were unmasked, they were still rejected: But Anno 26 H. 8. then at a Parliament a Bill was preferred, That all Inheritances might be forfeited for Treason; (so that as under a vail) lands in tail were forfeited for Treason) which was accepted of. The Statutes of 26 H. 8. & 31 H. 8. are not to be taken or extended beyond the words of the Statute, which are; *That every Offender hereafter lawfully convicted of any manner of high Treason, by Presentment, confession, Verdict, or Process of Outlawry, shall forfeit, &c.* It doth not appear that Francis Bigot was attainted in any of these wayes; For the Inquisition is, That he was Indicted and convicted, but *Non sequitur* that he was convicted by any of those wayes, viz. Verdict, Confession, or Outlawry; And one may be attainted by other means: 4 E. 4. in *Placito Parliamenti*, Mortimer was attainted by Parliament; 1 R. 2. Alice Percy was attainted by Judgment of the Lords and Peers of the House of Lords in Parliament.

It was objected, That after an Indictment Verdict ought to follow: I answer, *Non sequitur*: for it may be without Verdict, viz. by standing mute; And then the Statute of 26 H. 8. doth not extend unto it, C. 3. part 10, 11. Admit it were an Attaindor within the Statute of 26 H. 8. yet Francis Bigot had not such lands which might be forfeited, C. 3. part 10. For this Statute doth not extend to Conditions or Rights, And C. 17. part 34. this Act of 26 H. 8. doth not extend to Rights and Titles: And it is cleer that Francis Bigot had not any Estate within the letter of the Act.

It was objected, That if we have not set forth the full Title of the King in the *Monstrans de Droit*, then is the *Monstrans de Droit* naught, and

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and void. I answer 9 E. 4. 51. 16 E. 4. 6. I find no book that in a *Monstrans de Droit* we should be put to observe that Rule: For a Petition were a going about; The Statute of 2 E. 6. cap. 6. gives the *Monstrans de Droit*: 16 E. 4. 7. If a Petition be void for want of instructing the King, and if all his Title be not set forth in it, then the Court is to abate the Petition; but after Judgment to find such a fault, he must have a *Scire facias*, and not a new Petition; and in our Case there was none who gave in such matter for the King.

Now I come to the Statute of 31. H. 8. The particular Act for the Attainder of *Francis Bigot*, and that he should forfeit all such Lands, &c. Conditions, Rights, &c. in Fee, and Fee tail saving, &c. and as the lands of *Francis Bigot* stood stated at the time of the making of this Act of 31. H. 8. the Statute did not extend to him to make him forfeit any thing In the Statute of 33. H. 8. Cap. 20. there were as many words as in this Statute of 31. H. 8. and many Cases upon the Statute of 33. H. 8. are adjudged upon the words, shall lose and forfeit. There is a difference betwixt an Act of Assurance, and an Act of Forfeiture; If the words be, That the King shall enjoy and have, it is then an Act of Assurance, and the lands are given to the King without Office; but by an Act of Forfeiture the Lands are not in the King without Office found. *Exceptio firmat regulam*, but our Case is out of the Rule. Savings in Acts of Parliaments were but of late days: 1. E. 4. there was a private Act: A Petition was preferred against divers in Parliament for sundry misdemeanours, and it was Enacted that they should forfeit unto the King and his heirs, &c. in that Act there was no exception of saving for it was but a forfeiture of their Rights, and Savings were but of late times, *Trin. 8. H. 8. Rot. 4.* A Petition of Right in the Chancery, upon that was a plea which was after the Attainder of the Duke of *Suffolk*) That the Duke did disseise him; it was shewed that the Attainder was by Parliament, and he shewed no saving to be in the Statute in the Petition; and yet it was well enough, *Com. 552.* *Wyat* Tenant in tail of the Gift of the King, made a Feoffment, and by Act of Parliament 2 *Maria* was attainted of Treason, by which he was to forfeit, &c. as in our Case.

I answer, That within two years after that Judgment, upon solemn argument it was adjudged contrarie, *Com. 562.* It was objected that in that Case a Writ of Error was brought, *Com. 562.* and that the Judgment was affirmed in the Case of *Walsingham*. I answer, that the same was by reason of the Plea in Barr: And *Com. 565.* there *Plowden* confesseth that the Judges were not agreed of the matter in Law, and the Lands in question in *Walsingham's* Case do remain with *Moulton*, and at this day are enjoy'd contrary to the Judgment given in *Walsingham's* Case: It was objected, That although this Act of 31. H. 8. was made after the Attainder, yet that it should relate to all the Lands which *Francis Bigot* had

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had at the time of the Treason committed. I answer, That this Act of 31. H. 8. is but a description what Lands he shall forfeit, viz. all the Lands which he had at the time of the Treason committed.

The second Point is upon the Remitter of *Roger Ratcliff* before the Inquisition, for there was a discent to *Roger Ratcliff*. When Tenant in Tail is attainted of Treason, his blood is not corrupted, *C. 9. part. 10. Lumleys Case*. And the Statute of 33. H. 8. is the first Statute which vests Lands forfeit for Treason in the King without Office found: So as according to the Lord *Lumley's Case*, *C. 3. part. 10.* before this Statute of 33 H. 8. the Land did discent to the issue in tail. The Rule of *Nullum tempus occurrit Regi*, is to be meant for the preserving of the Kings Right, but not to make the King to do wrong. *Com. 488.* there the Remitter is preferred before the King. 49. E. 3. 16. there the Devise of a Common person was preferred before the Right of the King. 3. H. 7. 2. the Lord *Greistock's Case*: The Dean of *York* did recover against him, and before Execution the Lord died, his heir within age; the Dean shall have his Execution, notwithstanding that the King hath right to have the Ward: A *fortiori* a Remitter shall be preferred before the Kings Title. *C. 7. part. 28.* The Rule *Nullum tempus occurrit Regi*, is to be intended when the King hath an Estate or Interest certain and permanent, and not when his Interest is specially limited, when and how he shall take it, and not otherwise.

The third Point was, Whether *Ratcliff* hath brought his proper Action. The words of the Act of 2 E. 6. cap. 8. which giveth the *Monstrans de Droit*, are to be considered: A Remitter is within the words of the Act. Divers Errors were assigned by the other side for matter of Form: 1. Because the *Venire facias* want these words (*tam milites quam alios*.) *Sheffield* being a Noble man, and a Peer of the Realm, It appeareth by the Register 7. that the same was the ancient Form in every common persons Case; but of late that Form was left. 2. Admit that it were a good Exception, then it ought to have been taken by way of Challenge, as it appeareth 13. E. 3. *Challenge* 115. *Dyer* 107. 208. 3. The Statute of 35. H. 8. Cap. 6. makes a new Law, and prescribes a Form. *Precipimus, &c. quod Venire facias coram, &c.* 12 *Liberos & Legales homines, &c.* and then if it ought to be by the Register (*tam milites quam alios*) yet here is a new Statute against it: And by the Statute of 2. E. 6. Cap. 32. this Statute of 35 H. 8. is made perpetual. And by the Statute of 27. Eliz. Cap. 6. the Statute of 35. H. 8. is altered in *parvo*, and augmented in the worth of the Jurors: and by the Statute of 18. Eliz. Cap. 14. It is Enacted, That after Verdict, &c. the Judgment thereupon shall not be stayed or reversed by reason of any default in Form, or lack of Form, or variance from the Register. The second Error assigned was, because that there are two *Venire facias*, and two *Disfringas*, after that Issue was joyned. The

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Lord *Sheffield* sueth unto the King to have the first *Venire facias*, and first *Distingas* quashed, and it was quashed with *Ratcliff's* consent. Secondly, admit there were two *Venire facias*, yet it ought to be intended that the proceedings was but upon one of them, and that the best: *M. 17. Jacobi*, in the *Common Pleas*, *Bowen and Jones's Case*: In Error upon a Recovery in Debt, there were two Originals certified, and there the one was good, and the other naught; the Judges did take it that the Judgment and proceedings were upon the good Original, and the Judgment was affirmed in the Kings Bench: *M. 15 H. 8. Rott. 20.* the same Case. Two Originals, one bearing date after the Judgment, the other before the Judgment; and upon a Writ of Error brought, the Judgment was affirmed, for by intendment the Judgment was given upon the first Original, which bore date before the Judgment. Another Error was assigned, because the Plea was, That such a one was seised of the Castle and Mannor of *Mulgrave predictis* in the plural number: I answer, that there is not any colour for that Error, for the word (*predictis*) doth shew that the Mannor and Castle are not one and the same thing: So upon the whole matter, I pray that the Judgment given in the Court of Pleas may be affirmed: Sir *Henry Teluerton* argued for the Lord *Sheffield*, that the Judgment might be reversed. There are three things considerable in the Case: First, If any right of the ancient estate tail was in *Francis Bigot* who was attainted, at the time of his Attainder: Secondly, admit that there was an ancient right, if it might be forfeited being a right coupled with a Possession, and not a right in gross: Thirdly, Whether such a Possession descend to *Francis Bigot*, that he shall be remitted, and if this Remitter be not overreached by the Office. First, If by the Feoffment of *Francis Bigot*, 21. H. 8. when he was *Cestuy que use*, and by the Livery the right of the ancient entail be destroyed; And I conceive it is not, but that the same continues, and is not gone by the Livery and Seisin made: There is a difference, when *Cestuy que use* makes a Feoffment before the Statute of 1 R. 3. and when *Cestuy que use* makes a Feoffment after the said statute of 1 R. 3. For, before the statute hee gives away all, *Com 352.* but after the statute of R. 3. *Cestuy que use* by his Feoffment gives away no Right. In 3 H. 7, 13. is our very case almost; For, there the Tenant in Tail made a Feoffment unto the use of his Will (so in our Case,) and thereby did declare that it should be for the payment of his debts, and afterwards to the use of himself and the heirs of his body, and died; the heir entred before the debts paid (but in our Case he entred after the debts paid) there it is said that the Feoffment is made as by *Cestuy que use* at the Common Law, for his entrie was not lawfull before the debts paid. But when *Francis Bigot* made a Feoffment 21 H. 8. he was *Cestuy que use* in Fee, and then is the Right of the Estate tail saved by the Sta-

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tute of 1 R. 3. And by the Statute of 1 R. 3. he gives the Land as Servant, and not as Owner of the Land, and so gives nothing but a possession, and no Right. 5 H. 7. 5. *Cestuy que use* since the Statute of 1 R. 3. is but as a Servant, or as an Executor to make a Feoffment. And if an Executor maketh a Feoffment by force of the Will of the Testator, he passeth nothing of his own Right, but only as an Executor or Servant: 9 H. 7. 26. proves that *Cestuy que use* since the Statute of 1 R. 3. hath but only an Authority to make a Feoffment, For *Cestuy que use* cannot make a Letter of Attorney to make Livery for him, for he hath but a bare Authority, which cannot be transferred to another: *Cestuy que use* hath a Rent out of Land, and by force of the Statute of 1 R. 3. he maketh a Feoffment of the Land, yet the Rent doth remain to him, for he giveth but a bare possession: So in our Case, the right of the Estate Tail doth remain in *Francis Bigot*, notwithstanding his Feoffment as *Cestuy que use* by the Statute of 1 R. 3. If *Cestuy que use* by force of the Statute of 1 R. 3. maketh a Feoffment without Warranty, the Vouchee shall not Vouch by force of that Warranty; For as *Fitzherbert* saith, *Cestuy que use* had no possession before the Statute of 27. H. 8. Cap. 10. 27 H. 8. 23. If Feoffees to Use make a Letter of Attorney to *Cestuy que use* to make a Feoffment, he giveth nothing but as a Servant. The Consequent of this Point is, That the right of the old Estate Tail was in *Francis Bigot* at the time of his Attainder, and was not gone by the Feoffment made 21 H. 8.

The second Point is, Whether a right mixt with a possession of *Francis Bigot* might be forfeited by the Statutes of 26. H. 8. and the private Act of 31. H. 8. The Statute of 31. H. 8. doth not save this Right no more then the Statute of 26. H. 8. For they are all one in words. I say that he hath such a right as may be lost and forfeited by the words of the Statute of 26. H. 8. Cap. 13. For that Statute giveth three things. First, It gives the Forfeiture of Lands, and not of Estates. Secondly, How long doth that Statute give the lands to the King? For ever, viz. to the King his Heirs and Successors. Thirdly, It gives the lands of any Estate of Inheritance, in Use or Possession, by any Right, Title or means. This Estate Tail is an Estate of Inheritance, which he hath by the Right, by the Title, and by the means of coming to the Right it is forfeited. These two Statutes were made for the punishment of the Child, For the Common Law was strict enough against the Father, viz. he who committed the Treason; And shall the same Law which was made to punish the Child, be undermined to help the Child? The ancient Right shall be displaced from the Land, rather then it shall be taken from the Crown, which is to remain to the Crown for ever. And this Statute of 26. H. 8. was made *pro bono publico*, and it was the best Law that ever was to preserve the King and his Successors from Treason, for it is as it were a hedge about the King; For before this

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Statute, Tenant in Tail had no regard to commit Treason, For he forfeited his Lands but during his own life, and then the Lands went to the issue in Tail: But this Statute doth punish the Child for the Fathers offence, and so maketh men more careful not to offend, least their posterity may beg. I take two grounds which are frequent in our Law: First, That the King is favoured in the Exposition of any Statute. *Com.* 239, 240. The second, That upon the construction of any Statute, nothing shall be taken by equity against the King. *Com.* 233, 234. Here in this Case although the Right were not in possession, yet it was mixed with the possession, from *Anno* 13. *E.* 1. untill 26. *H.* 8. Tenant in Tail feared not to commit Treason, For the Statute of *West.* 2. did preserve the Estate Tail, so as the Father could not prejudice his issue *per factum suum*: And therefore the Commonwealth considering that a wicked man did not care what became of himself, so as his issue might be safe, provided this Statute of 25. *H.* 8. *Cap.* 13. although the Statute of 16. *R.* 2. *Cap.* 5. which giveth the Premunire, doth Enact that all Lands and Tenements of one attainted in a Premunire shall be forfeited to the King: Yet Tenant in Tail in such Case did not forfeit his Lands: *C.* 11. *part.* 63. *b.* as the Statute of *West.* 2. *Cap.* 1. saith in particular words, That Tenant in Tail shall not prejudice his issue; Therefore the Statute of 25. *H.* 8. in particular words saith, That Tenant in Tail shall forfeit his Lands for Treason. The Right of *Francis Bigot* is not a right in gross, but a Right mixed with a possession. The Statute of *West.* 2. *Cap.* 1. brought with it many mischiefs; For by that Statute, the Ancestor being Tenant in Tail, could not redeem himself out of prison, nor help his wife, nor his younger children; and that mischief continued untill 12. *E.* 4. *Taltaram's* Case, and then the Judges found a means to avoid those mischiefs by a common Recovery; and this Invention of a common Recovery was a great help to the Subject. Then came the Statute of 32. *H.* 8. *Cap.* 36. which Enacted, That Fines levied by Tenant in Tail, should be a good barr to the issue of any Estate, any way entailed. If the Son, issue in tail, levieth a Fine in the life of his Father who is Tenant in tail, it shall be a barr to him who levieth the Fine, and to his issues. And both these, *viz.* the Common Recovery, and the said Statute did help the Purchaser; And shall not this Statute of 26. *H.* 8. help the King? The Statute of 26. *H.* 8. *Cap.* 13. hath not any strength against the Ancestor, but against the Child. For the Construction of Statutes I take three Rules; First, When a Case hapneth which is not within the Letter, then it is within the intent and equity of the Statute, *Com.* 366. 464. Secondly, All things which may be taken within the mischief of the Statute, shall be taken within the Equity of the Statute 4. *H.* 6. 26. *per Martin.* Thirdly, When any thing is provided for by a Statute, every thing within the same mischief is, within the same Statute, 14. *H.* 7. 13. The Estate tail of *Francis Bigot*.

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Bigot and *Katharine* his wife is forfeited by the Statute of 26 H. 8. There is a difference when the Statute doth fix the forfeiture upon the person, As where it is enacted that *7. S.* shall forfeit his lands which he had at the time of his Attaindor; The Judges ought expound that Statute only to *7. S.* But the Statute of 26 H. 8. doth not fix the forfeiture upon the person, but upon the land it self: And Exposition of Statutes ought to extend to all the mischiëfs. 8 *Eliz.* Sir *Ralph Sadler's* Case in *B. R.* where an Act of Parliament did enact, That all the lands of *Sadler* should be forfeited to the King, of whomsoever they were holden: *Sadler* held some lands of the King; in that case the King had that land by Escheat by the Common-Law, and not by the said Statute. *Com. 563.* The Law shall say, that all the rights of the tail are joyned together to strengthen the estate of the King. Tenant in tail, before the Statute of 1 E. 6. cap. 14. of *Chantries*, gave lands to superstitious uses, which were enjoyed five years before the said Statute of 1 E. 6. made: Yet it was adjudged that the right of the issue was not saved, but that the land was given to the Crown; for the issue is excluded by the saving in the said Statute. If Tenant in tail give the lands to charitable uses, the issue is barred, For the saving of the Statute of 39 *Eliz.* cap. 5. excludes him, And he is bound by the Statute of *Donis.* So the Statute of 26 H. 8. cap. 13. and the private Act of 31 H. 8. do save to all but the heirs of the Offenders.

The third Objection was; That *Ratcliffe* was not excluded by the saving; for it was said, That the same doth not extend but to that which is forfeited by his Ancestors body: And here *Ratcliffe* had but a Right, and that was saved; And the Statute doth not give Rights. I answer, first, The Statute of 26 H. 8. is not to be expounded by the letter, for then nothing should be forfeited but that only which he had in possession and use. Tenant in tail is disseised and attainted for treason: By the words of the said Statute of 26 H. 8. he forfeits nothing, yet the issue in tail shall forfeit the lands; for the issue in tail hath a right of Entrie which may be forfeited, 6 H. 7. 9. A right of Entrie may escheat, and then it may be forfeited. Secondly, The Statute is not to be construed to the possession; but if he hath a mixt right with the possession, it is forfeited, but a right in grosse is not forfeited: Tenant in tail of a Rent or Seignorie purchaseth the Tenancie or the Land out of which the Rent is issuing, and is attainted; He shall forfeit the Seignorie and Rent, or the Land, for the King shall have the Land for ever, And then the Seignorie or Rent shall be discharged, for otherwise the King should not have the Land for ever; For the King cannot hold of any Lord a Seignorie, 11 H. 7. 12. The heir of Tenant in tail shall be in Ward for a Meanaltie descended unto him, the Meanaltie not being in esse; and yet it shall be said to be in esse, because of the King, *C. 3. part 30. Cars Case*: Although the Rent was extinguished, yet as to the King it shall be in esse.

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The difference is betwixt a Right clothed with a possession, and a right in grosse, *viz.* where the Right is severed from the possession, there it is in grosse. For there the Right lieth only in Action; and therefore neither by the Statute of 26 H.8. nor by the private Act of 31 H.8. such a Right is not forfeited, C.3. part 2. C.10. part 47, 48. Right of Action by the Common-Law nor by Statute-Law shall escheat, and therefore it is not forfeited: For no Right of Action is forfeitable, because the right is in one, and the possession in another. *Perkins* 19. A Right *per se* cannot be charged. 27 H.8.20. by *Mountague*, A man cannot give a Right by a Fine, unless it be to him who hath the possession; C.10. part *Lampis* Case; Sever the possibility from the right, and it doth not lie in grant or forfeiture; but unite them (as they are in our Case) and then the Right may be granted or forfeited, for that Right clothed with a possession may be forfeited. A Right clothed with the possession, 1. It tastes of the possession, 2. It waits upon the possession, 3. It changes the possession. The Bishop of *Durham* hath all Forfeitures for Treason by the Common-Law within his Diocese, *viz.* the Bishoprick of *Durham*: And if Tenant in tail within the Bishoprick commits Treason and dyeth, the Issue in tail shall enjoy the land against the Bishop, *Dyer* 289 a. pl. 57. For the Bishop hath not the land for ever, but the Issue in tail may have a *Formedon* against the Bishop: But in our Case it is otherwise: Tenant in tail maketh a Feoffment, and takes back an estate unto himself in tail, the remainder in Fee to his right heirs; The Bishop in such case shall not have the land forfeited for Treason, because that the Bishop cannot have the estate tail; but in such case the King shall have the by the Statute of 26 H.8. cap.13. And the Bishop in such case shall not have the Fee, because it is one estate, and the King shall not wait upon the Subject, *viz.* the Bishop. The Right waits upon the possession: For 11 H.7.12. If the son and a strange disseiseth the father, and the father dyeth, this right infuseth it self into the possession, and changeth the possession, And it is a Release in fact by the father to the son, 9 H.7.25. *Br' Droit* 57. A Disseisor dyeth seised, and his heir enters and is disseised by A. The first Disseisee doth release unto A. all his right; All the right is now in the second Disseisor, *viz.* A. because the right and the possession meet together in A. 40 E.3.18. b. Tenant in tail makes a Lease for life with warranty: If Tenant for life be impleaded by the heir to whom the warranty doth descend, he shall rebut the right in tail being annexed with the possession, for that is in case of a saving of the land by that right: But where one demands land, there all the Right ought to be shewed. 11 H.4.37. If a man be to bring an Action to recover, then he ought to make a good title by his best right, if he hath many rights: But if a man be in possession, and an Action be brought against him, then he may defend himself by any of his rights, or by all his rights. 11 H.7.21. Tenant in tail maketh a Feoffment to his use upon

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upon Condition, and afterwards upon his Recognisance the land is extended, and afterwards the Condition is performed, yet the interest of the Conusee shall not be avoided; For although the Extent come upon the Fee, and not upon the Tail, yet when the Extent was, it was extracted out of all the rights. *C. 7. part 41.* A Tenant in tail makes a Lease for life, now he hath gained a new Fee by wrong; and afterwards he makes a Lease for years, and Tenant for life dyeth; He shall not avoid his Lease for years, although he be in of another estate, because he had a defeisible title and an ancient right, the which if they were in several hands shall be good, as the Lease of the one, and the Confirmation of the other; And being in one hand, it shall be as much in Law as a saving of the Right.

In our Case, the Right and Possession both were in *Francis Bigor*; And *Ratcliffe* is entitiled to the old estate tail, and to the new also. There is a difference betwixt him who claims the land so forfeited to the King, and the heir of the body of the person attainted: *Litt. 719.* Land is given to *A* and the issue males of his body, the remainder to the heirs females of his body: If the Father commit Treason, both heir male and female are barred, for they both claim by the Father; but if the heir male after the death of his Father be attainted of Treason, the King shall have the lands as long as he hath issue male of his body, and then the heir female shall have the lands, for she shall not forfeit them, because she claimeth not by the brother, but by the father. *Com. in Manxels case,* A man hath three several rights of estate tails, and comes in as Vouchee; If the Recovery pass, it shall bar all his Rights for one Recompence, and they shall be all bound by one possession. There is a difference where the Kings title is by Conveyance of the party, and where for forfeiture for Treason by this Statute of 26 H. 8. cap. 13. *v. the Abbot of Colchesters Case*: The Abbot seised in the right of his house, did commit Treason, and made a Lease for years, and then surrendred his house to the King after the Statute of 26 H. 8. The question was whether the King should avoid the Lease: It was adjudged, That the King was in by the surrender, and should not avoid the Lease, and not by the Statute of 26 H. 8. But if the King had had it by force of the Statute, then the King should have avoided the Lease. *Com. 560.* Tenant in tail, the reversion to the King; Tenant in tail maketh a Lease for years, and is attainted of Treason; The King shall avoid the Lease upon the construction of the Statute of 26 H. 8. which gives the lands unto the King for ever.

The third point is upon the Remitter. This point had been argued by way of Admittance: For as I have argued, The ancient right is given away unto the King; and then there is no ancient right, and so no Remitter. There is a difference where the issue in tail is forced to make a Title, and where not: In point of defence he is not so precisely forced

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to make his Title, as he is in case of demand. Whereas the Defendant demands the lands from the King, the Discent will not help him, because the Attaindor of the Ancestor of *Ratcliffe* hinders him in point of title to make a demand, *Dyer* 332 b. In this case he ought to make himself heir of the body of *Francis Bigot* and *Katharine*. *C. 8. part 72. C. 9. part 139, 140.* There *Cook* couples the Case of Fine levied, and the Case of Attaindor together. *C. 8. part 72.* Land is given to husband and wife, and to the heirs of their two bodies: The husband alone levies a Fine with proclamations, Or is attained of Treason and dyeth: The wife before Entry dyeth: The issue is barred; and the Conusee, or King hath right unto the land, because the issue cannot claim as heir to them both, viz. father and mother, for by the father he is barred. *5 H. 7. 32, 33. C. 9. part 140.* Husband and wife Tenants in tail; If one of them be attained of Treason (as it was in our Case) the lands shall not descend to the issue, because he cannot make title. And there *Cook* puts the Case, That if lands be given to an Alien and his wife, they have a good estate tail, and yet it is not descendable to the issue. The Consequence then of all this is, That if *Ratcliffe* cannot take advantage of the descent by reason of the disability by Attaindor, *a fortiori* he shall not be remitted: And yet I confess that in some Cases one may be remitted against the King. *Com. 488, 489, 553.* But that is where the King is in by matter of Law by Conveyance; but in this Case the King is in by an Act of Parliament, and there shall be no Remitter against a matter of Record. Another reason is, because that the possession is bound by the Judgment of Attaindor and the Act of Parliament. *5 H. 7. 31. 7 H. 7. 15. 16 H. 7. 8.* A descent of land shall not make a title against the King or any other who hath the land by an Act of Parliament.

But then in our Case, If there should be a Remitter, yet the same is overreached by the Office. *C. 3. part 10.* before the Statute of 33 H. 8. cap. 20. there ought to have been an Office found in the Case of Attaindor of Treason, *Br. Cases* 103. *Brook Office Devant, &c.* 17. I do not mean an Office of intitling, but an Office declaratory of a conspicuous title. *C. 5. part 52.* There are two manner of Offices; One which vesteth the estate and possession of the land &c. in the King; Another which is an Office of Instruction; and that is when the estate of the land is lawfully in the King, but the particularity thereof doth not appear upon record: And the Office of Instruction shall relate to the time of the Attaindor, not to make *Queen Elizabeth* in our Case in by descent, but to avoid all mesne Incombrances; And is not this Remitter an Incombrance? And for that purpose the Office shall relate: For in things of Continuance *Nullum tempus occurrit Regi*, *C. 7. part 28.* For so the rule of *Nullum tempus &c.* is to be understood of a thing of Continuance, and not a thing *unica vice*, v. *Fitz. Entre Congeable*, 53. *Trav. 40.* where it is said, Where the King hath cause to seise for the forfeiture of
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Tenant for life, if the Tenant for life dyeth, the Reversion may enter; for in that case *Tempus occurrit Regi*, and the King cannot seize after the death of the Tenant for life. 35 H. 6. 57. There is no discent against the King, and if there be no discent, then there is no Remitter. The consequence of all this is, That the Office doth relate to the Right, And that the *Monstrans de Droit* doth not lie: And the want of Office found for all this time, was the fault of the Kings Officers, and shall not prejudice the King. But if the Office should not relate, then the *Monstrans de Droit* would lie, because then the King was in but by one single matter of Record. We shew in the Office, 33 Eliz. That there issued forth a Commission directed to certain of the Privy-Council to enquire of the Treason; and if *Francis Bigot* upon the Treason were Indicted. And in our Case we shew immediately another Commission was directed to the Lord Chancellor and the two Chief Justices &c. to arraign *Francis Bigot*. And all that is confessed by *Ratcliffe* himself, viz. *modo & forma*. And therefore the Objection which *Glanville* made was frivolous, viz. That it did not appear that *Francis Bigot* was attainted by Verdict, by Confession, or by Outlawry. And so he concluded, That for these causes the Judgment given in the Court of Common-Pleas ought to be reversed.

George Crook argued for *Ratcliffe*, and he prayed that the Judgment might be affirmed. I will argue only these points following. 1. That *Francis Bigot* had not so much as a right of Action at the time of his Attaindor, for he had not any right at all. 2. Admit that he had a right of Action, If this right of Action be given to the King by the said Statutes of 26 & 31 H. 8. It was objected, That the right being clothed with a possession, that the same is given to the King: But I will prove the contrary. 3. When *Francis Bigot* being Tenant in tail, and being attainted and executed for Treason, and then *Katherine* his wife dyeth being one of the Donees in tail, 21 H. 8. and the lands descend to *Ratcliffe*, If the Office afterwards found shall relate to take away the Remitter. I say it doth not, but that his Remitter doth remain to maintain his *Monstrans de Droit*, and he is not put to his Petition. The chief point is, What right *Francis Bigot* had at the time of his Attaindor. 1. When *Ralph Bigot* being Tenant in tail, 6 H. 8. made a Feoffment in Fee, what right remained in *Francis* his Son? The right is in abeyance, viz. *in nubibus*, that is *in custodia Legis*: And then *Francis Bigot* had no right of that entail 21 H. 8. when he made the Feoffment. Com. 487. There *ius* is divided, viz. *ius recuperandi*, *ius invandi*, *ius habendi*, *ius retinendi*, *ius percipiendi*, *ius possedendi*; but here *Francis Bigot* had not any of these rights. Com. 374. If the Discontinuee of Tenant in tail levieth a Fine with proclamations, and five years passe, and Tenant in tail dyeth, the issue in tail shall have other five years, because he is the first to the right. 19 H. 8. 7. C. 7. part 81. If Donee in tail maketh a

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Feoffment in Fee, *in re veritate* the Donor hath not *in re, neque ad rem*. C. 3. part 29. Litt. 649. There it appeareth that the right to an estate tail may be in abeyance. Com. 352. *Walsingham's Case*: There the King gave land in tail to *Wyat*, who made a Feoffment unto *Walsingham*; Afterwards *Wyat* was attainted of Treason, and there the estate tail of *Wyat* was forfeited; but the cause there was, because that the reversion was in the Crown, and so no discontinuance by his Feoffment, because that the reversion was in the Crown. In our Case, no right of the estate tail was in *Francis Bigot* after the Feoffment unto his own use, but the right is in abeyance. It was objected, That the Writ of *Formedon* is *Disconditio jura*, and the *Monstrans de Droit* was so: I answer It is so in point of form in the Writ, but not in substance. C. 7. part 14. Tenant in tail makes a Lease for life, and Tenant for life dyeth: Now he hath an ancient right, and the Donor may avow upon the Tenant in tail notwithstanding his Feoffment, but that is by reason of privity, and not by reason of any right he hath. *Jus recuperandi* did descend to the issue in tail, viz. *Francis Bigot*, 21 H. 8. He who hath a right of Action giveth the same away by his Livery and Feoffment, as appeareth by the Cases put in C. 1. part 111. It was objected, That *Cestuy que use* was an Attorney or Servant, therefore he doth not passe his own right, for he cannot make an Attorney to make Livery; and 9 H. 7. 2. was cited to be adjudged so: But it is adjudged to the contrary, M. 25 H. 8. in the Kings Bench, rot. 71. betwixt the Bishop of London and Keller, as it appeareth in *Dyer* 283. and *Bendloe's Reports*, and C. 9. part 75. For there it is expresse, that *Cestuy que use* may make a Letter of Attorney to make Livery; which proves that he makes not the Feoffment as a Servant, but as Owner of the Land. It was objected, That *Cestuy que use* was as an Executor: but that I deny. 49 E. 3. 17. a. *Persey*: Executors cannot make a Feoffment, but they ought to make a Sale; and the Vendee, viz. the Bargaineer is in without Livery and Seisin: But if they do make a Feoffment by the Livery, all their right is given away: But if an Attorney giveth Livery in the name of his Master, nothing of his own right to the same Land is given away by the Livery and Seisin; but if he maketh Livery in his own name, then he giveth away his own right; and the Statute of 1 R. 3. cap. 1. maketh the Feoffment good which is made by *Cestuy que use* against him and his heirs. C. 1. pr. 111. By Livery and Seisin his whole right is given away. Com. 352. The Feoffees of *Cestuy que use* are disseised; the Disseisor enfeoffeth *Cestuy que use*, who enfeoffs a stranger: And the Question was, If by this Feoffment made by *Cestuy que use* the right of the first Feoffees were determined and extinct. *Fitzherbert* held that the right was gone; and in that case the Uses were raised after 1 R. 3. and before 27 H. 8. cap. 10. Although *Telvertan* held that it was meant of a Feoffment before the Statute of 1 R. 3. *Jus recuperandi* was in *Francis Bigot*. Then the que-

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question is, Whether this Right were given away by the Statutes of 26 & 31 H. 8. The Statute of 26 H. 8. & 31 H. 8. are several and distinct Statutes: The words of the Statute of 26 H. 8. are, *That the party offending shall forfeit all his Possession and Use*; but there is no word of *Right* in the Statute; and that Statute doth not extend to give any land but that which was in possession or use: And the cause was, because before that Statute of 26 H. 8. Uses were not given unto the King for Attaindor for Treason, they being but a Trust and Confidence. C. 11. part 36 b. The Statute sayes, *By any wayes, title, or means*: But observe when this Statute was made; It is a penal Statute, and therefore shall be taken strictly, *Stamford* 129 b. C. 11. part 36 b. The Statute of 5 & 6 E. 6. takes away Clergy; but if a stranger be in the house by licence of the Owner, the party shall have his Clergy, because out of the words, and being a penal Law, it shall be taken strictly. The Statute of 33 H. 8. cap. 20. forfeits for Treason Right to the Land, viz. right of Entry; but the Statute of 26 H. 8. giveth not any Right. Before the Statute of 33 H. 8. a right of Entry was not given to the King for Treason; *a fortiori* a right of Action was not forfeited to the King. It is the Statute of 31 H. 8. the private Act which hurteth us, which expressly gave Rights: But this Right in our Case is not forfeited by this Statute, which giveth Rights which a man hath; But in our Case *Francis Bigor* had not the Right, but the Right was in abeyance. Statutes in points of Forfeiture forfeit no more then a man hath: But yet a Statute may give to the King that which a man hath not. C. 11. part 13. The statute of *Monasteries* gave that to the King which was not, viz. Monasteries in reputation, saving to none but strangers, no not to the Donors. *Hussies Case*; Tenant in tail doth bargain and sell to the King; and a statute gave it to the King, saving to strangers; but neither the Donor nor his issue were within the saving. *Old Entries*, 423. b, c, d. It was enacted, That the Duke of *Suffolk* should forfeit for Treason all his Lands, Rights, and Tenements. and all such Rights and Titles of Entry which he had: But thereby rights of Action were not given to the King, but only rights of Entries. The statutes of 31 & 33 H. 8. are alike in words: If Tenant in tail, the Remainder over, forfeit &c. the Remainder is saved without words of saving: But if the statute giveth the land by name unto the King, then the Remainder is not saved, but is destroyed. If a Right of Action be given unto the King, the statutes of Limitation and Fines are destroyed, for he is not bound by them. C. 48. 486. in point of forfeiture, *Stamf.* 187, 188. There is a difference betwixt real and personal Rights given to the King. C. 3. part 3. A right of Action concerning Inheritances are not forfeited by Attaindor, &c. But Obligations, Statutes &c. are forfeited by Attaindor. C. 7. part 9. A right of Action is not given to the King by general words of an Act, because it lieth in privacy, And it would be a vexation to the subject if they should be given. C. 4. p. 124.

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Although that a *Non compos mentis* cannot commit Felony, yet he may commit Treason; for the King is *Caput & salus reipublice*. If *Non compos mentis* maketh a Feoffment, and then committeth Treason, the King shall not have an Action to recover the Land of the *Non compos mentis*, as the party himself may have: But if *Non compos mentis* be disseised; and then be attainted of Treason, then the King may enter into the Lands, because the party himself had a right of Entry which is given to the King.

It was objected, That a right of Action clothed with a possession might be given to the King. Tenant in tail discontinues, and takes back an estate, and is attainted of Treason: This right of Action shall not be forfeited to the King, for his right of Action was to the estate tail. In our Case the right of Action was to *Katherine*, for she was Tenant for life. The Attaindor was 29 H. 8. and the Act which forfeited the Right was made 31 H. 8. and then the right and possession were divided: 30 H. 6. Grants 91. The King may grant the Temporalities of a Bishop before they happen to be void, And so he may grant a Ward: But the King cannot grant the Lands of *7. S.* when he shall be attainted of Treason; for the Law doth not presume that *7. S.* will commit Treason. The Devise of a Term, the Remainder over is good: But if the Devise be of a Term to one in tail, the Remainder over, the Remainder is void, because the Law doth presume that an estate in tail may continue for ever. C. 8. part 165, 166. The Law did not presume that *Digby* at the time of the Conveyance intended to commit Treason.

It was objected, That whatsoever may be granted, may be forfeited: I deny that, C. 3. part 10. by *Lumley's Case*: If the issue in tail in the life of his Father be attainted of high Treason and dyeth, it is no forfeiture of the estate tail: But if the issue in tail levieth a Fine in the life of his Father, it is a bar to his issues. C. 3. part 50. Sir *George Brown's Case*, 10 E. 4. 1. there Executors may give away the goods of the Testator, but they cannot forfeit the goods of their Testator. Com. 293. *Osborn's Case*, Guardian in Soccage may grant the Ward, but he cannot forfeit him. C. 3. part 3. Right of Actions reals, because they are in privacy by general words of a Statute, are not given to the King, v. *Dyer* 67. *Stringfellow's Case*: That which is in *custodia Legis* cannot be taken as a Distress in a Pound overt, cannot be taken out of the Pound upon another Distress.

The third Point is, If he were remitted; And I conceive that he was remitted: When Tenant in tail is attainted of Treason, the issue at the Common Law should inherit as if he had not been attainted, *Lit.* 47. C. 1. part 103. for as to the Estate tail, there was no corruption of blood. C. 10. part. 10. If Tenant in tail before the Statute of 26. H. 8. commit Treason, the land shall descend to his issue, for the issue doth not claim by the Father, but *per formam doni*. C. 8. part 166. such a dis-

scend:

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scient shall take away entrie; But in our Case *Ratcliff* had both possession and right, and therefore is remitted; the speciall Verdict finds that he was remitted, and the Judgment given in the Court of Pleas in the Exchequer was, that he was remitted. It was objected, that the Remitter was destroyed by the relation of the Office; but the same is not so, for the Office relates only to avoid Incombrances, viz. acts done by himself; but to devest the Freehold, and to settle the same in the King, the Office shall not relate: And if it should relate, then the King should lose many Lands which he now hath: *Com. Nichols Case*. Tenant for life upon condition to have Fee, &c. If the Office shall relate, then the same takes away the Freehold out of the person attainted, *a principio*, and then the Fee cannot accrue; and so by that means the King should lose the lands. A Remitter is no incombrance, for it is an ancient right, and the Act of the King cannot do wrong. *C. 1. part 44. b. 27 Aff.* 30. There Tenant for life with clause of re-entrie is attainted the reversioner entreth, the Office shall not relate to take the Freehold out of the reversioner, *C. 3. part 38. Relatio est filio juris*, and shall never prejudice a third person; and the Office found in the life of *Katherine* shal not prejudice him, *C. 9. part, Beaumonts Case*; the husband and wife are Tenants in tail, the husband is attainted of Treason and dyeth, yet the wife is tenant in tail, when it is not to the damage or prejudice of the King, there *tempus occurrit Regi*: *C. 7. part. 28. Baskerville's Case*. From 29 H. 8. untill 33 H. 8. *Katherine*; and afterwards *Ratcliff* had the possession; and then the Law was taken to be, that *Ratcliff* had a lawfull possession. For these reasons he concluded, that the Judgment ought to be affirmed.

In *Trinity Term* following, viz. *Trin. 21. Jacobi Regis*, the Case was argued again: and then *Coventry* the Kings Attorney general, argued for the Lord *Sheffield*, That the Judgment given in the Court of Pleas in the Exchequer, ought to be reversed. He said, I will insist only upon the right of the Case, Whether upon the right of the Case *Ratcliff* may maintain a *Monstrans de Droit*. First, If by the Attainder, the right of the old Estate tail, as well as of the new Estate tail be forfeited: Secondly, Admitting that the old right of entail be not forfeited, then if the Office do overreach the Remitter, for then a *Monstrans de Droit* doth not lie, but a Petition for the reason of the discontinuance. First it is evident, that when *Ralph Bigor* Tenant in tail in possession 6 H. 8. made a Feoffment, that that was a discontinuance, and it is as clear that the right of the old Estate tail vested in *Francis Bigor*. The Feoffment made by *Francis Bigor*, 21 H. 8. did not devest the right of the old tail: First for the weaknesse of the Feoffment; Secondly for the inseparableness of the Estate tail, which is incommunicable, and not to be displaced by weak assurance. That Feoffment was made according to the Statute of 1 R. 3. and not by the Common Law, but only by force of the said

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^said Statute. The Feoffment is without Deed, and so nothing passeth but only by way of Livery, or else nothing at all. Also at the time of the Feoffment in 21 H. 8. the Feoffees were in seisin of the Lands; and Ratcliff shews in his *Monstrans de Droit*, that Francis Bigot did disseise the Feoffees, and so the Feoffment had no force as a Feoffment at the Common Law, but only by the Statute of 1 R. 3. For at the Common Law, if *Cestuy que use* had entred upon the Feoffees, and made a Feoffment, nothing had passed. There is a difference betwixt a Feoffment at the Common Law, and a Feoffment according to the Statute of 1 R. 3. which operates *sub modo*. Feoffments are the ancient Conveyances of Lands, but Feoffments according to the Statute of 1 R. 3. are upstarts and have not had continuance above 150 years. In case of Feoffments at the Common Law, the Feoffor ought to be seised of the lands at the time of the Feoffment; but if a Feoffment be according to the Statute of 1 R. 3. in such Case the Feoffor needeth not be in possession: Feoffments at the Common Law give away both Estates and Rights; but Feoffments by the Statute of R. 3. give the Estates, but not the Rights. In case of Feoffment at the Common Law, the Feoffee is in the *Per*, viz. by the Feoffor; but in case of Feoffments by the Statute of R. 3. the Feoffees are in in the *Post*, viz. by the first Feoffees, 14 H. 8. 10. Brudnel says, that a Feoffment by *Cestuy que use* by the Statute of 1 R. 3. is like to fire out of a flint, so as all the fire which cometh out of the flint will not fasten upon any thing but tinder or gunpowder: So a Feoffment by *Cestuy que use* by force of the Statute of 1 R. 3. will not fasten upon any thing but what the Statute requires, 5 H. 7. 5. 21 H. 7. 25. 8 H. 7. 8. 27 H. 8. 13. 23. by these books it appeareth, that if *Cestuy que use* maketh a Lease for life, during the Lease he gaines nothing, and after the Lease he gains no reversion; for the Lessee shall hold off the Feoffees, and of them he shall have aid, and unless it be by deed Indented, in such a Case a Reservation of Rent is void, and the Lessor in such a Case cannot punish the Lessee for waste; for he makes the Lease merely by the power which the Statute gives him. 8. H. 7. 9. *Cestuy que use* makes the Feoffment as servant to the Feoffees, and if not as servant to the Feoffees, yet at least as servant to the Statute of 1 R. 3. If a man entrench upon another, and maketh a Lease for life, he gains a reversion to himself, and shall maintain an Action of Waste; but *Cestuy que use*, when he entrench and maketh a Lease, he hath no reversion, nor shall punish waste. And as it is in the Creation, so is it in the Continuance. 4 H. 7. 18. If *Cestuy que use* for life or in tail maketh a Lease for life, it is warranted during his own life, by the Statute of 1 R. 3. but if Tenant for life at the Common Law, maketh a Feoffment, or a lease for life: there the first Lessor ought to avoid this forfeiture by entrie, and it is not void by the death of the second Lessor, viz. the Tenant for life, 27 H. 8. 23. A *Feme Covert* is *Cestuy que use*, the husband maketh a Feoffment

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Feoffment and dieth, the Feoffment is void by his death : *Br. Feoffments to Uses* 48. If *Cestuy que use* for life levieth a fine, it is no forfeiture, but good by the Statute of 1 R. 3. during his own life. And if in such case Proclamations pass, there needeth no claim nor entrie within five years; but the Law is contrarie of Tenant for life by the Common Law: for if Tenant for life at the Common Law levieth a fine, it is a forfeiture. *Dyer* 57. *Cestuy que use* for life or in tail, maketh a Lease for life, the Lease is determined by the death of *Cestuy que use*, and the Lessee is become Tenant at sufferance; but a Lease for life by Tenant for life at the Common Law, is not determined by the death of Lessee for life who was Lessor, and his Tenant is tenant for life, and not at sufferance, as in the Case before, and the first Lessor ought to avoid it by entrie. *Br. Feoffments to Uses* 48. A Recovery by *Cestuy que use* in tail or in fee, is ended by his death.

By these Cases appears a main difference betwixt the validitie of a Feoffment by *Cestuy que use*, and the Feoffment at the Common Law: The Statute of 27 H. 8. of Uses, doth not execute Uses which are in abeyance, *C. 1. part. Chudleigh's Case* 9 H. 6. by the Common Law, the Devise to an Infant *in ventre sa mer* is good, but by the Statutes of 32, and 34 H. 8. of Wills such a Devise is not good, for the Statute Law doth not provide for the putting of lands in abeyance. By the Statute of 1 R. 3. All Feoffments and Releases, &c. shall be good and effectual to those to whom they are made to their uses And this Feoffment in our Case, was not made to a man *in Nubibus*. *Cestuy que use* by this Statute of 1 R. 3. makes a lease for years, the remainder over to the right heirs of *T. S.* the remainder is not good, for the Statute doth not put it in abeyance, for the remainder ought to be limited to one *in esse*. 28 H. 8. *cap. 4.* giveth power to Executors to sell: that Executor who proveth the Will, shall sell, and when he selleth, if he have any right to the land, the right of the said Executor is not gone by that Statute.

So if Commissioners upon the Statute of *Bankrupts*, sell the Lands of the *Bankrupt*, and one of the Commissioners hath right to the land so sold, his right is not extinct: And so in this Case the Statute limits what shall pass. Upon the Statute of 13 Eliz. *cap. 4.* which makes the lands of Receivers liable for their debts, if the King selleth, the right of the Accomptant passeth, but not the Kings right. 1 E. 3. 60. An Abbot having occasion to go beyond the Seas, made another Abbot his Procurator, to present to such Benefices which became void in his absence: That Abbot presents in the name of him who made him Procurator, to one of his own Advowsons, the right of his own Advowson doth not pass; but yet it is an usurpation of the Abbot which went beyond sea, to that Church. What is the nature of this right? All rights are not given away by Feoffments at the Common Law, *Lit.* 672. Land is given unto husband and wife in tail, the husband maketh a Feoffment, and takes back.

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back an Estate to him and his wife both of them are remitted. Which Case proveth that the husband hath left in himself a right notwithstanding the Feoffment. 41 E. 1. 41 Aff. 1. *John at Lee's Case*. So at the Common Law a Feoffment doth not give away all the right; This right doth stick so fast in the issue, as the Statute of *West. 2. cap. 1.* can back it unto him. 2 E. 3. 23. 22 E. 3. 18. At the Common Law, if Tenant in tail had offered to levie a fine, the Judges ought not to receive it, but ought to have refused it, if it had appeared unto them that the Conusor was Tenant in tail: the same was before the Statute of 4 H. 7. which gave power to Tenant in tail to levie a fine; for the Statute of *West. 2. Cap. 1.* saies, *Quod finis sit nullus.* 2 E. 2. age 77. 2 E. 3. 33. 3 E. 3. 1. 24 E. 3. 25. If Donee in tail levieth a Fine, yet there is no remedie against his Tenant, for he shall not be compelled to attorn, for that the right is in the Donor. 2 E. 2. *Avowry* 181. 48 E. 3. 8. *Avowry* was made upon the Donee in tail, notwithstanding that he made a Feoffment: and *Avowry* is in the realtie and right. 4 E. 3. 4. 4 H. 6. 28. 10 H. 7. 14. In a *Replevin*, ancient *Demiseue* is a good plea, because the *Avowry* is in the realtie: The Donor shall know for homage upon the Donee, after that the Donee hath made a Feoffment. 7 E. 4. 28. the Donee shall do homage. And *Litt. 90.* saith, That none shall do homage, but such as is seised in his own right, or in the right of another. 2 E. 2. *Avowry* 85. 7 E. 54. 28. 15 E. 4. 15 *Gard.* 116. the issue shall be in Ward notwithstanding a Feoffment by Tenant in tail, *Com. 561.* Tenant in tail maketh a Feoffment, yet the right of the tail doth remain in the Tenant in tail. 21 H. 7. 40. Tenant in tail of a Rent, grants the same in Fee; if an Ancestor collateral releaseth with Warranty, the same bindeth the Tenant in tail.

There is a common Rule, That a Warranty doth not bind when a man hath not a right: The Cases cited in C. 1. part, *Albonies Case*, where Feoffments give Rights, I agree. *Barton and Ewers Case*, A man made a Feoffment of Land, of which he had cause to have a Writ of Error, he gave away his Writ of Error by the Feoffment; I agree all those Cases, for that is in Cases of Feoffments at the Common Law; but in our Case the Feoffment is by the Statute of 1 R. 3. In our Case there is *ius habendi, possedendi, & recuperandi*: It is like unto a plant in Winter which seemeth to be dead, yet there is in it *anima vegetativa*, which in due time brings forth fruit: So the right in our Case is not given away, nor is it in abeyance, but in *Francis Bigot*, which may be regained in due time. *Dyer 340.* there was *Scintilla juris*, as here in our Case. 19 H. 8. 7. Where Tenant in tail maketh a Feoffment, and the Feoffee levieth a fine, and five years pass, there it is said that the Issue in tail shall have five years after the death of Tenant in tail who made the Feoffment; and the reason is, because he is the first to whom the right doth descend. This Case was objected against me: yet I answer, that
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Tenant in tail in that Case hath right, but he cannot claim it by reason of his own Feoffment; he cannot say he hath right, but another may say he hath right.

In our Case *Francis Bigot* cannot say he hath a Right in him, but another may say he hath a Right. It is like where Tenant in Fee taketh a Lease for years by Deed Indented of his own Lands; He, during the years cannot say that he hath Fee, yet all other may say that he hath the Fee. C. 4. part 1 27. The King shall avoid the Feoffment for the benefit of a *Lunatique*, which Feoffment the *Lunatique* had made; and shall not the King avoid a Feoffment which a *Lunatique* hath made, for his own benefit, viz for the benefit of the King himself? I conceive that he shall. Secondly. Admit the right be in the person, viz. in *Francis Bigot*; yet they object that it is a right of Action, and so not forfeited. If this right be in the person at the time of the Attainder, it shall be forfeited; if it be not in his person, but in *Nubibus*, yet it shall be forfeited. Tenant in tail makes a Feoffment unto the use of himself and his wife in tail, if the old right of entail rest, or not, in his person, it is forfeited to the King. 34 *Eliz.* this very Point was then adjudged, Where Tenant in tail before the Statute of 27 H. 8. of Uses, made a Feoffment unto the use of himself and his wife in tail. It was resolved upon mature deliberation by all the Judges of *England*, that the old Estate tail was in such case forfeited for Treason. Set this Judgment aside, yet it rests upon the Statute of 26 H. 8. A general Act for forfeiture for Treason, and the particular Act of 31 H. 8. which was made for the particular Attainder of *Francis Bigot*.

I will argue ~~argue~~ only upon the Statute 26 H. 8. which hath three clauses. First, to take away Sanctuary; Secondly, to provide that no Treason be committed, and the Offender punished; The third, which clause I am to deal with, which giveth the forfeiture of Lands of Inheritance, &c. These three clauses do depend upon the Preamble. It was high time to make this Statute: For when H. 8. excluded the Pope, he was to stand upon his guard: And that year of 26 H. 8. there were five several Insurrections against the King, therefore it was great wisdom to bridle such persons: King *Ed. 6.* and Queen *Mary* repealed divers Statutes for Treason and Felony, yet left this Statute of 26 H. 8. to stand in force. Anno 5 E. 6. cap. 5. this Statute of 26 H. 8. somewhat too strict was in part repealed, viz. That the Church lands should not be forfeited for the Treason of the Parson. This third branch doth consist upon a *Purview*, and a *Saving*, and both agree with the Preamble: The *Purview* is ample; Every Offender, and Offenders of any manner of High Treason, shall forfeit and lose, &c. I observe these two words in the Statute, shall (*Forfeit*) those things which are forfeitable, and (*Lose*) those things which are not forfeitable. But it shall be lost, that the heir of the Offender shall not find it, shall Forfeit and lose to the

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King his heirs and successors for ever, so it is a perpetual forfeiture; shall forfeit all his Lands, which includes, Use, Estate and Right, by any right, title or means: So you have Estate, Right, Title and Use. Here *Francis Bigot* shall forfeit the Castle and Mannor of *Mulgrave* unto the King, his heirs and Successors, and he must forfeit the Land, Right Title and Use, otherwise it cannot be to the King for ever; and what is saved to strangers, all shall be saved; and what will you not save to the Offender and his heirs, all his Lands, Right, &c. as was saved to strangers.

It was objected, that it was not an Act of Assurance, but an Act of Forfeiture, which is not so strong as an Act of Assurance. I do not doubt of the difference; but how much will that difference make to this Case? doth the Statute goe by way of Escheat? it doth not; but in case of Petty Treason Land shall Escheat; but when the Statute of 25 E. 3. speaketh of High Treason, the words of the said Statute are, Shall forfeit the Escheat to the King: But is the Right devided from the King? Truly no; the word (*Forfeit*) take it in *nomine*, or in *natura*, is as strong a word, as any word of Assurance. *Alienare* in the Statute of *West. 2. cap. 1. Non habeant illi potestatem alienandi*; so *non habent illi potestatem forisfaciendi*, is in the nature of a Gift. *Com. 260.* Forfeiture is a gift in Law, *Ex fortior est dispositio legis quam hominis*, and so as strong as any assurance of the partie. If a Statute give the Land to the King, then there needeth not any Office, 27 H. 8. *Br. Office. Com. 486.* The Right vests before Office. It was objected that the statute of 26 H. 8. doth not extend to a right of Action, but to a right of Entry. The purpose of this Act of 26 H. 8. is not to attain any particular person, as the Statute of 31 H. 8. was made for the particular Attaindor of *Francis Bigot*. 5 E. 4. 7. *Cestuy que use* at the Common Law, did not forfeit for Felony or Treason; but by this Act of 26 H. 8. *Cestuy que use* shall forfeit both Use and Lands, out of the hands of the Feoffees. 4 E. 3. 47. 4 Aff. 4. The husband seised in the right of his wife at the Common Law for Treason shall not forfeit but the profits of the lands of his wife during his life, and not the Freehold it self; but by this Act of 26 H. 8. the Freehold it self is forfeited. 18 Eliz. in the Common Pleas, *Wyats Case*, C. 10. *Lib. Entries* 390. And if the Statute of 26 H. 8. had had no saving, all had been forfeited from the wife. 7 H. 4. 32. there it is no forfeiture, yet by this Statute it is a forfeiture. A right of Action shall not Escheat, 44 E. 3. 44. *Entre Cong. 38 C. 3 part the Marquess of Winchesters Case*, and *Bowries Case*, and C. 7. *part. Inglefeld's Case*. A right of Action *per se* shall not be forfeited by the Rules of the Common Law, nor by any Statute can a right of Action be transferred to another; but by the Common Law a right of Action may be quashed, and exonerated, and discharged in the possession of the King. For it is out of the Rule which is in C. 10. *part 48*, for the cause
of

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of quieting and repose of the Terre-Tenants, otherwise it would be a cause of Suits; But all Rights, Tythes, Actions, &c. might for the same reasons, viz. for the quiet of the Terre-Tenants, and the avoidance of Suits and Controversies, be released to the Terre-Tenants. By the same reason here the right of Action of *Francis Bigot* shall be discharged and exonerated by this forfeiture, viz. for the quiet and repose of the Terre-Tenants; for the Law delights in the quiet and repose of the Terre-Tenants. If *Francis Bigot* had granted a Rent, the ancient right of the tail had been charged. *C. 7. part 14.* Where Tenant in tail makes a lease for life, and grants a Rent charge, and Tenant for life dieth, he shall not avoid his charge, although he be in of another Estate, because he had a defeisable possession, and an ancient right, the which, &c. so as they could not be severed by way of conveyance and charge, and no lawfull act; Then I admire how he will sever this from himself by his unlawfull act, viz. the Feoffment, the discontinuance: *Lit. 169.* If a man commit Treason, he shall forfeit the Dower of his wife, yet he doth not give the dower of his wife, but it goes by way of discharge in those Lands. 13 *H. 7. 17.* Tenant by the Curtesie in the life of his wife, cannot grant his Estate of Tenant by the Curtesie to another, but yet he for Felony or Treason may forfeit it, viz. by way of discharge. A Keeper of a Park commits Treason, there the King shall not have the Office of Keeper for a forfeiture, because it is an Office of trust; but if he had been Keeper of the Kings Park, and had been attainted, there he should forfeit his Office by way of discharge and exoneration. This Statute of 26 *H. 8.* hath been adjudged to make Land to revert, and not strictly to forfeit.

Austin's Case cited in *Walsingham's Case*. Tenant in tail, the reversion in the King, the Tenant makes a Lease for years and dies, the issue accepts of the Rent, and commits Treason, the Lease is avoided, for the King is not in by forfeiture by the Statute of 26 *H. 8.* but by way of Reverter by the Statute of 26 *H. 8.* It was objected, that if Tenant in tail maketh a Feoffment, and takes back an Estate for life, and is attainted of Treason, that he shall not forfeit his old right, I agree that Case: For indeed it is out of the Statute of 26 *H. 8.* which speaks of Inheritance, and in that Case the Tenant hath but a Freehold. The Statute of 26 *H. 8.* saith, that it shall be forfeited to the King, his heirs and Successors; And if in our Case the old right should remain, then it should be a forfeiture but during the life of the Testator. When the Common Law, or Statute Law giveth Lands, it gives the means to keep them, as the Evidences; So here the King is to have by force of this Statute of 26 *H. 8.* the Evidences. The forfeiture of right is expressly within the Statute of 26 *H. 8.* as the forfeiture of Estate, as by any right, title or means, for the old Estate tail is the means of Estates since 6 *H. 8.* And if you will take away the Foundation, the Building will

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fall: For all the Estates are drawn out of the old Estate tail. The Statute of 26 H. 8. is not an Act of Attaindor, for none in particular is attainted by the Act; but the Act of 31 H. 8. doth attain *Francis Bigon* in particular. It was objected, that here in this case there needed not to be any expresse Saving. I answer, that there are divers Statutes of Forfeitures: yet the Statutes have Savings in them, so as it seems a saving in such Acts were not superfluous, but necessary. The Act of 33 H. 8. for the attainder of Queen *Katharine*, there is a saving in the Act, and yet an Act of Forfeiture. *Dyer* 100. there the land vested in him in the Remainder by force of a saving in the Act, so the saving is not void, but operative. *C. 3. part Dowries Case*, *vid.* the Earl of *Arundels* Case, there the saving did help the wife, so it appears savings are in Acts of Parliaments of Forfeiture, and Acts of Attaindor. *Dyer* 288, 289. The Bishop of *Durham* had *Jura Regalia* within his Diocese, and then the Statute of 26 H. 8. came: now whether the Forfeiture for Treason should be taken away from the Bishop, by reason of that Statute, and given to the King, was the doubt? It was holden, that of new Treasons the Bishop should not have the Forfeitures, for those were not at the Common Law, as the Forfeitures of Tenant in tail; but that he should have the Forfeitures of Lands in Fee within his Diocese; and that he had by force of the saving in the Statute; so that a Saving is necessary and operative. *Com. Nichols's Case*, there *Harpers* opinion, that there needs no saving to strangers; but yet a saving is necessary for the Partie and the Issue, if they have any thing, as well as strangers. *vid. C. 3. part Lincoln Colledg Case*. It is the Office of a good Interpreter, to make all the parts of a Statute to stand together. *Com. 559*. By these general words (*Loss and Forfeit*) and by excluding of the heir in the saving, the heir is bound; So the Judges have made use of a Saving, for it is operative.

2 *Ma. Austin's Case* cited in *Walsinghams Case*. Tenant in tail the Reversion in the Crown: Tenant in tail made a Lease for years, and levied a Fine to the King, the King shall not avoid the Lease, for the King came in in the Reverter; but in such Case, if he be attainted of Treason, then the King shall avoid the Lease. So a Statute of Forfeiture is stronger then a Statute of Conveyance. By this Statute of 26 H. 8. Church Land was forfeited, for so I find in the Statute of Monasteries, which excepts such Church Lands to be forfeited for Treason. *Dyer*. Cardinal *Poole* being attainted, did forfeit his Deanary, and yet he was not seised thereof in *jure suo proprio*, for it was *jus Ecclesie*. 27 E. 3. 89. A Writ of Right of Advowson by a Dean, and he counteth that it is *jus Ecclesie*, and exception that it is not *jus sue Ecclesie*; But the Exception was disallowed, for the *jus* is not in his natural capacite, but in his politique capacite; and yet by this Statute of 26 H. 8. such Church Land was forfeited for Treason: this is a stronger Case then our Case.

Vid. C.

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Vide C. 9. part. Beaumont's Case: Land is given to husband and wife in tail, and the husband is attainted of Treason; the wife is then Tenant in tail, yet the Land is forfeited against the issue, although it be but a possibility. for the whole estate is in the wife; but the cause thereof is, because it was once coupled with a possession. *C. 7. part. Nevils Case*, There was a question whether an Earldom might be entailed and forfeited for Treason, which is a thing which he hath not in possession nor use, but is inherent in the blood: And there resolved that the same cannot be forfeited as to be transferred to the King, but it is forfeited by way of discharge and exoneration. *12 Eliz. Dyer, the Bishop of Durham's Case*: There, if it had not been for the saving, the Regal Jurisdiction of the Bishop had been given to the King by the Statute of 26 H. 8. This Statute of 26 H. 8. was made for the dread of the Traitor: For the times past saw how dangerous Traitors were, who did not regard their lives, so as their lands might descend to their issue; it was then desperate for the King, Prince, and Subject; For the time to come it was worse. The Law doth not presume that a man would commit so horrid an act as Treason: so it was cited by Mr. *Crook*, who cited the case, That the King cannot grant the goods and lands of one when he shall be attainted of Treason, because the Law doth not presume that he will commit Treason: If the Law will not presume it, wherefore then were the Statutes made against it? If the Land be forfeited by the Statute of 26 H. 8. much stronger is it by the Statute of 31 H. 8. But then admit there were a Remitter in the Case, yet by the Office found the same is defeated: Without Office the Right is in the King, *Com. 486. c. 5. part 52* where it is said, There are two manner of Offices, the one which vests the estate and possession of the Land &c. in the King, where he had but a Right, as in the case of Attaindor the Right is in the King by the Act of Parliament, and relates by the Office. *Com. 488.* That an Office doth relate. *38 E. 3. 31.* The King shall have the mean profits. The Office found was found in *33 Eliz.* and the same is to put the King in by the force of the Attaindor which was *29 H. 8.* and so the same devests the Remitter. Tenant in tail levieth a Fine, and disseiseth the Conusee and dyeth, the issue is remitted, then proclamations pass; now the Fine doth devest the Remitter. *C. 1. part 47* Tenant in tail suffereth a common Recovery, and dyeth before Execution; the issue entreteth, and then Execution is sued; the Estate tail is devested by the Execution; and so here in our Case it is by the Office. *C. 7. part 8.* Tenant in tail maketh a Lease and dyeth (his wife *priviment ensunt*) without issue; the Donor entreteth, the Lease is avoided; afterwards a Son is born, the Lease is revived. *Com. 488.* Tenant in capite makes a Lease for life rendring rent, and for non-payment a re-entry, and dyeth: the rent is behind, the heir entreteth for non-payment of the rent, and afterwards Office is found of the dying seised, and that the land is holden:

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den *in capite*, and that the heir was within age: In that case the Entry for the Condition broken was revived, and the Estate for life revived, 3 E. 4. 25. A Disseisor is attainted of Felony, the Land is holden of the Crown; the Disseisee entred into the Land, and afterwards Office is found that the Disseisor was seised, the Remitter is taken out of the Disseisee: which is a stronger case then our Case; for there was a right of Entry, and in our Case it is but a right of Action, which is not so strong against the King. And for these Causes he concluded, That the Judgment given in the Court of Pleas ought to be reversed, And so prayed Judgment for the Lord of *Sheffield* Plaintiffe in the Writ of Error.

This great Case came afterwards to be argued by all the Judges of *England*: And upon the Argument of the Case the Court was divided in opinions, as many having argued for the Defendant *Ratcliffe* as for the Plaintiffe: But then one new Judge being made, viz. Sir *Henry Telverton*, who was before the Kings Solicitor, his opinion and argument swayed the even ballance before, and made the opinion the greater for his side which he argued for, which was for the Plaintiffe the Lord *Sheffield*; And thereupon Judgment was afterwards given, That the Judgment given in the Court of Pleas should be reversed, and was reversed accordingly: And the Earl Lord *Sheffield*, now Earl of *Mulgrave*, holdeth the said Castle and Mannor of *Mulgrave* at this day according to the said Judgment. Note, I have not set here the Arguments of the Judges, because they contained nothing almost but what was before in this Case said, by the Counsel who argued the Case at the Bar.

Pasch. 21 Jacobi, in the Kings Bench.

418.

IT was the opinion of *Ley* Chief Justice, *Chamberlain* and *Dodderidge* Justices, That a Defendants Answer in an English Court is a good Evidence to be given to a Jury against the defendant himself; but it is no good Evidence against other parties. If an Action be brought against two, and at the Assises the Plaintiffe proceeds only against one of them, in that case he against whom the Plaintiffe did surcease his suit may be allowed a Witnesse in the Cause. And the Judges said, That if the Defendants Answer be read to the Jury, it is not binding to the Jury; and it may be read to them by assent of the parties. And it was further said by the Court, That if the party cannot find a Witnesse, then he is as it were dead unto him; And his Deposition in an English Court in a Cause betwixt

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betwixt the same parties Plaintiffe and Defendant may be allowed to be read to the Jury, so as the party make oath that he did his endeavour to find his Witnesse, but that he could not see him nor hear of him.

Pasch. 21 Jacobi, in the Kings Bench.

419.

THe Husband, a wife seised of Lands, in the right of the wife levied a Fine unto the use of themselves for their lives, and afterwards to the use of the heirs of the wife; *Proviso* that it shall and may be lawfull to and for the husband and wife at any time during their lives to make Leases for 21 years or 3 lives. The wife being Covert made a Lease for 21 years; And it was adjudged a good Lease against the husband, although it was made when she was a Feme Covert, and although it was made by her alone, by reason of the *Proviso*.

Pasch. 21 Jacobi, in the Common-Pleas.

420.

NOte that Hobart Chief Justice said, That it was adjudged *Mich. 15 Jacobi* in the Common-Pleas, That in an Action of Debt brought upon a Contract, the Defendant cannot wage his Law for part, and confesse the Action for the other part. And it was also said, That so it was adjudged in *Tarr's Case* upon a Shop-book. And *vide 24 H.8. Br. Contract 35*. A Contract cannot be divided. *38 H.6. 14*. If the Law doth not lie for parcel, then it is suspended for the whole where the debt is an entire debt. And so it was adjudged in this Case.

Pasch. 21 Jacobi, in the Kings Bench.

421.

NOte it was cited by *Chamberlain Justice, 15 Jacobi*, to be adjudged, That where a man brought an Action upon the Case against another man for calling of him Bastard, that the Action was maintainable.
The

328 *Young and Englefield's Case. Intratur,*

The Defendant brought a Writ of Error, and shewed for Error, That the Plaintiffe did not claim any Inheritance, or to be heir to any person certain: But notwithstanding that Error assigned, the Judgment was affirmed. And he said, That if one saith of *J. S.* that his Father is an Alien, that an Action upon the Case will lie, because it is a disability to the Son. *Quare.*

Trin. 21 Jacobi, in the Kings Bench.

422. *YOUNG AND ENGLEFIELD'S Case. Intratur, Pasch. 21 Jac. Rot. 102.*

YOUNG brought an Action of Trespass for entring his Close, &c. abutted upon one side with *Pancras*, and butted on the other side with *Graves-Inne-Lane*. Upon *Not guilty* pleaded, the parties were at issue: And the Record of *Nisi prius* was *Graves-Inne-Lane*; And thereupon the party was Nonsuit. And now it was moved to have a *Venire facias de novo*. And a Case was cited expresse in the point, betwixt *Farthing* and *Dupper*, 9 *Jacobi Rot.* 1349. Where in an Action upon the Case upon *Assumpsit*, the Plea-Roll was *Six weeks*, and the Record of *Nisi prius* *Six moneths*: And the Jury being sworn, the Plaintiffe was Nonsuit; and a *Venire facias de novo* was awarded, and the Nonsuit was recorded. *Ley* Chief Justice, You cannot have a new *Venire facias* if the Nonsuit be recorded: And if the Record of *Nisi prius* varieth from the Record, then it can be no Nonsuit, because there is no Record upon which the Nonsuit can be, and the *Nisi prius* was prosecuted without warrant. Judicial Process are of Record, because they are by the Award of the Court: But if the Transcript of a Record be mistaken by a Clerk, it issueth out by the Award of the Court; and if it vary, then it is no Record. The president cited is direct in the point: There was a *Venire facias de novo*; But I conceive there is a difference where the Jury is sworn, as it is in the President, and then the Plaintiffe is Nonsuit; but in our Case the Plaintiffe was Nonsuit before the Jury was sworn. But *per Curiam* the Case is the stronger to have a new trial.

Trin.

Trin. 21 Jacobi, in the Kings Bench.

423. PRITCHARD and WILLIAMS Case.

IN an *Ejectione Firme*, the Jury found for the Defendant. Now it was moved for the Plaintiffe, That the Defendant might not have Costs, because the *Venire facias* is mistaken. And the Defendants Counsel cited a President in the Case, *viz. Mich: 18 Jacobi, betwixt Done and Knot*; where the Defendant had Judgment for his Costs, notwithstanding that the Plaintiffe mistook his *Venire facias* in an *Ejectione Firme*, where the Jury found for the Defendant.

Trin. 21 Jacobi, in the Kings Bench.

424. WISEMAN and DENHAM's Case.

WIseman brought an Action upon the Case against Denham Parson, and declared that there is a Custom within the Town and Parish of Landone, of which the Defendant is the Parson. That every Parishoner who keeps so many Kyne within the said Parish, should give and pay to the Parson, for his Tythe-Milk, so many Cheeses at Michaelmas: and shewed how that he kept so many Kyne, *viz. 20, &c.* within the said Parish, and that he did tender *apud Landone* so many Cheeses at Michaelmas to Denham the Defendant, being Parson, who refused them, and to take them away, but suffered them to be and continue in the Plaintiffs house, for which cause he brought the Action: The Defendant did demur upon the Declaration. George Crook, the Action will lie; for the Plaintiffe hath a damage, by reason that the Parson doth not take away his Tythe-Cheese. And it is like unto the Case in 13 H. 4. *Action sur le Case* 48. Where a man sold unto another Hay, and because that the Vendee took not away his Hay, an Action upon the Case did lie, for it was a damage to the Plaintiffe to let it stand upon his ground, for he durst not put his Cattel into his ground to feed, lest they should eat the Hay and spoil it, and so he should be lyable to an Action to be brought by the Vendee: So if Tythe be lawfully set forth, and the Parson refuseth the Tythe, but will sue in the Spiritual

Court for the Tythe, an Action upon the Case will lie : *à fortiori* in this Case, for the Cheeles may be cumbersome and troublesome to the Partie, so as he cannot make the best use or benefit of his house. *Paul Crook* contrarie : and he took exception because the tender is alledged to be *apud Landone*, and it is not shewed that it was at his house at *Landone*, or in any place certain ; and he said that the Action will not lie, because here is no damage to the Plaintiffe : and it is like the Case when a man makes a Lease rendring Rent, Cheese, or Corn, and the Tenant tendreth it, and the Lessor refuseth it ; the Lessee cannot have an Action upon the Case against his Lessor, but he may plead the matter in barr, in an Action brought by the Lessor. And the Case of 13 H. 4. before put, is not to the purpose, for theret was part of the Bargain to take it away by such a time : And in our Case the Plaintiffe may plead the matter in barr to the Plaint. 43 Eliz. betwixt *Crispe* and *Jackson*, an Action upon the Case was brought for suing in the Ecclesiastical Court for Tythes which were due, and he recovered damages.

Secondly, Admit that the Action doth lie, then it is because it is a damage unto him that they remain in his house ; but it doth not appear that the tender was made at his house, but *apud Landone*, which might be a mile from the house ; and so because it was his own fault, the Action will not lie as this Case is, by reason of the tender. *George Crook*, It was adjudged in a *Cornish* Case, that an Action upon the Case lieth against a Parson which doth not take away his Tythe corn, or hay, because it spoyle the ground upon which it stands, and because the partie cannot have the free use of his Land : So in our Case, he cannot have the free use of his house, the cheeses cumbring his house, and offending him with their smell. *Haughton* Justice, If the Action were well laid, it would lie for the Cause, but in this Case it is not well said : If any thing makes the Action to lie, it is the damage which the Plaintiffe doth sustain by the cheeses being in his house ; but here it is laid to be tendred *apud Landone*, and it is not said at his house, and *non constat* how the cheeses came to his house ; for if they were brought back by the Plaintiffe, or by his commandment, then the Action will not lie ; but if he had laid his Action, that he gave notice to the Parson that he had so many cheeses ready for him for his Tythe, and had required him to send for them, then if the Parson had not carried them away, the Action would have lien ; but for the reason before, the Action as it is laid is not maintainable. *Dodderidge* Justice, There are two matters in this case : First, If the Action will lie for the matter. Secondly, If the Action will lie by reason of the Tender : as to the first, I put this difference, That in some case it will lie, and in some case it will not lie ; in this case the Action is not maintainable.

Where a tender is of a thing which the Partie ought to have, by the tender the property is changed, and there a damage may arise by reason that

that he will not take it away, as in the case of 13 H. 4. put before; there the Plaintiffe had damage by the standing of the hay upon the ground, for he could not put in his cattel, for then he might be in danger of an Action, because the cattel might eat the hay.

If one setteth forth his Tythe, and the Parson having no ice thereof will not take it away, an Action lyeth, because it as a damage to the Land: But in our Case, admit the tender were at his house, yet this tender doth not alter the Property in the person, and they being his own cheeses, he hath no loss; so the difference is, where the partie hath damage and loss, and where he hath none, as here in our Case he hath no damage; the tender of the Rent saves from the penaltie, but doth not discharge the dutie; but admit that the Action will lie, yet in this Case the Declaration is insufficient, For the tender is not alledged to be at any place certain in the Village, for it may be that he tendred them to the Parson in the Church-yard of *Landone*, and then by the carrying of them home to his house again, he hath lost the Action which he might have had if he had tendred them at his house. *Ley* Chief Justice, There is a difference in the case of Tenders: If I tender such a thing which is due, and the other refuseth it, and I must pay the same thing in kinde, if by the keeping of it I be endamaged, I may have an Action upon the Case: and that is our Case.

If a man setteth out his Tythe hay, or Corn (the tender in our Case is a setting forth of the Tythe Cheese) and the Parson refuseth to take it away, and it perish in keeping, I am excused for the perishing of it; but I may have an Action against the Parson, for letting it stay upon my Land to my annoyance. So if *A.* commit goods to me to keep in my house, and I require him to take them away, and he refuseth to do it, I may have an Action upon the Case against him, for it is a trouble to me to remove them for him: and so in our Case; but it is otherwise where I pay Rent-Corn, and the Lessor doth refuse it, I may pay him in other corn. If one be to pay so much corn, and the other will not receive it being tendred unto him, untill it be dearer, an Action upon the Case will lie, for he is thereby endamaged. In our Case the partie is damaged, for his house is annoyed by the smell, and also encombred therewith, and the rooms of his house are valuable, and he cannot make use of them at his pleasure: the Tender ought to be, where by the ordinary course the thing hath its being: As at the place of the shearing of the Sheep, the Parson is to demand his Tythe wool, and there it is to be paid, if there be a person who hath power to deliver it; the things which are ordinarily in the house, as butter, cheese, &c. are to be tendred there, and there they are to be demanded, and thereof notice is to be given to the Parson; and the partie is not bound to carry them to the Parsons house. The cheeses which are to be paid by this Custom, are to be paid of cheeses made upon that Land, and not of cheeses which the

Parishoner shall buy elsewhere : The tender is alledged to be in the Town of *Landone*, and the Law intends the cheeses to be in the Parishoners house and this general tender is to be understood at the place where the cheeses by intendment of Law are to be ; and on the other side it ought to be alledged, that the tender was not at the house : so as I conceive that the tender is good. *Dodderidge*, The intendment is not good in this case; for in every Declaration there ought to be certainty and verity; but in a plea in bar, there if it be a common intendment, it is sufficient. If a man speak generally of a Town, it is to be meant at the Hamlet where the Church stands. *Ley*, when a tender is pleaded, it is supposed to be at the place where the tender ought to be by the Law. As a man is bound to pay money, if he plead that he tendred it at *D.* it shall be intended that *D.* is the place where it ought to be paid. If the partie goeth to the Parsons house, and tells the Parson that he hath at his house such Tythe cheeses for him, and requires the Parson to send for them; here the notification is at the Parsons house, but the real tender is at the parties own house : And the partie plaintiffe in our Case cannot plead it otherwise then at *Landone*. *Haughton*, In this case the Law requires a special place of tender expressed, or else he shews no caule of Action: For if it were at any place out of his house, the Action will not lie, and the cheeses ought to be personally tendred. *Ley* Chief Justice; That would be inconvenient, for then he must carry them to him, and so he should be forced to wait upon the Parson. *Dodderidge*, 40 E. 3. If I tender to one a marriage, or a Ward, the woman, or Ward ought to be present at the time of the tender. Tender of money in a bag, as to say, I have money for you, is no good tender : and so it is of cheeses; to say, I have cheeses for you, is but a verbal tender, and it is not good ; but it ought to be tendred personally and in kinde. You will intend that the Parson was at the plaintiffs house at the time of this tender, and here is nothing in the case to direct you so to think. *Ley*, The place is but circumstance, for the Parson is tyed to demand them at the house, being the proper place of tender, by reason of their being there. *Dodderidge*, The cheese must be shewed the Parson, and that proves that he must be present : *Ley*, If he were present, then the tender is good : But if he be not there, but at another place, the notice is sufficient. *Dodderidge*, The Law requires certainty in a Declaration, and the matter cannot be taken by intendment ; so we ought to have a certainty set forth, otherwise no certain Judgment can be given. It was adjourned, for *Dodderidge* and *Haughton* Justices were against *Ley* Chief Justice : But as I have heard, the Case was afterwards adjudged for the Plaintiffe. There *quare* the Record of the Judgment.

Trin. 21 Jacobi, in the Kings Bench.

425.

A Man made a Lease for life, and covenanted for him and his heirs, That he would save the Lessee harmless from any claiming by, from or under him. The Lessor dyed, and his wife brought a Writ of Dower against the Lessee, and recovered; and the Lessee brought an Action of Covenant against the heir. And it was adjudged against the heir, because the wife claimed under her husband, who was the Lessor: But if the woman had been mother of the Lessor who demanded Dower, the Action would not have layen against the heir, because she did not claim by, from, or under the Lessor. And so it was adjudged, v. 11. H. 7. 7.b.

Trin. 21 Jacobi, in the Kings Bench.

426. SNELL AND BENNET'S Case.

A Parson did contract with A. his Executors and Assigns, That for ten shillings paid to him every year by A. his Executors and Assigns, that he, his Executors or Assigns should be quit from the payment of Tythes for such Lands during his life, viz. the life of the Parson. A. paid unto the Parson ten shillings, which the Parson accepted of; And made B. an Infant his Executor, and dyed. The mother of the Infant took Letters of Administration *durante minori etate* of the Infant, and made a Lease at Will of the Lands. The Parson libelled in the Ecclesiastical Court for Tythes of the same Lands against the Tenant at Will; who thereupon moved for a Prohibition. *Dodderidge*. During the life of the Parson the Contract is a foot; but the Assignee cannot sue the Parson upon this Contract, yet he may have a Prohibition to stay the suit in the Ecclesiastical Court, and put the Parson to his right remedy, and that is to sue here. This agreement is not by Deed, and so no Lease of the Tythes. The Parson shall have his remedy against the Executor for the ten shillings, but not against the Tenant at Will: and the Executor hath his remedy against the Tenant at Will. *Crook*, 21 H. 6. A Lease of Tythes without Deed is good for one, but not for more years, v. 16 H. 7. And afterwards a Prohibition was granted.

Trin.

Trin. 16 Jacobi, in the Kings Bench.

427. PHILPOT and FEILDER's Case.

THE Parties are at issue in the Chancery, and a *Venire facias* is awarded out of the Chancery to try the issue; and the *Venire facias* was, *Quod venire facias coram &c. duodecim liberos & legatos homines de vicineto de &c. quorum quilibet habeat quatuor lib. terra, tentmenorum, vel reddituum per annum ad minus, per quos rei veritas melius sciri poterit &c.* And it was moved in arrest of Judgment, That the *Venire facias* is not well awarded; for it ought to be *Quorum quilibet habeat quadraginta solidos terra, tentorum vel reddit. per an. ad minus*, according to the Statute of 35 H. 8. cap. 6. which appoints that every one of the Jurors ought by Law to expend forty shillings per annum of Freehold, and it ought not to be *quatuor libras terra &c.* according to the Statute of 27 Eliz. cap. 6. which Statute of Elizabeth doth not speak of the Chancery, but only of the Kings Bench, Common-Pleas, and the Exchequer, or before Justices of Assize. Before the Statute of 35 H. 8. no certain Land of Jurors was named in the *Venire facias*; but since the Statute of 35 H. 8. it was *quadragins. solidos*, untill the said Statute of 27 Eliz. and now it is *quatuor libras* in the Kings Bench, Common-Pleas, and Exchequer. It was adjourned.

At another day the Case was moved again, That the *Venire facias* ought to be 40 *solidos &c.* according to the Statute of 35 H. 8. cap. 6. And 10 H. 7. 9. & 15 were vouched, That if a Statute appoint that the King shall do an act in this form, the King ought to do it in the same form and manner: So if a Letter of Attorney be to make a Bill in English, and the same is made in Latine, it is not good, although it be the same in form and matter. *Cook lib. Entries 378. Waldrons Case* is, That in the Chancery the *Venire facias* was but 40: but that Case was between 35 H. 8. and 27 Eliz. cap. 6. Dodderidge and Hughton Justices, It is a plain case, For the *Venire facias* ought to be according to 35 H. 8. cap. 6. because the Statute of 27 Eliz. cap. 6. speaks nothing of the Chancery, *Quod nota.*

Trin.

Trin. 21 Iacobi, in the Kings Bench.

428. HEWET and BYE's Case.

IN an *Ejectione Firme* of a house in *Winchester*, the Ejectment was laid to be of a house which was in *australi parte vici, Anglice* the High-street. *Ley* Chief Justice, If it had been *ex australi parte vici*, then the South part had been but a Boundary: but here it is well laid. Then it was moved, That the *Venire facias* is *Duodecim liberos & legales homines de Winton*, and doth not say of any Parish in *Winton*. But notwithstanding it was holden good: For *Dodderidge* Justice said, That it is not like unto *Arundels Case*, *G. 6. part 14*: For there the Offence was laid to be done in *parochia Sancte Margarete de Westminster*, therefore the *visne* ought to be of the Parish; but in this case it being laid generally in *Winton* it is sufficient that the *visne* come out of *Winton*. Judgment was given for the Plaintiffe.

Trin. 21 Iacobi, in the Kings Bench.

429 WATERER and MOUNTAGUE's Case.

A Man made a Lease for six years: and the Lessor covenanted, That if he were disposed to lease the said lands after the expiration of the said term of six years, that the Lessee should have the refusal of it. The Lessor within the six years made a Lease thereof to *J.S.* for 21 years. *Dodderidge*, *Haughton*, and *Ley* Chief Justice, The Covenant is not broken, because it is out of the words of the Covenant. But *Dodderidge* said, *Temp. E. 1. Covenant 29*. The Lessee covenanted to leave the houses, trees and woods at the end of the term in as good plight as he found them; and afterwards the Lessee cut down a tree, that in that case the Covenant was broken, and the Lessor shall not stay untill the end of the term to bring his action of Covenant, because it is apparant that the tree cannot grow again and be in as good plight as it was when he took the Lease.

Trin:

Trin. 21 Jacobi, in the Kings Bench.

430.

OWFIELD against SHIERT.

A Writ of Error was brought to reverse a Judgment given in an Action of Debt; The Action of Debt was upon a *Concessit solvere, &c. pro diversis summis pecunia*; and the opinion of the Court was, That Debt doth not lie upon *Concessit solvere pro diversis summis, &c.* because it is incertainty: But the same Term in another Case, viz. *Stacius Case*, That by Custom of London, it was holden that Debt doth lie upon a *Concessit solvere pro diversis summis*: And it was then said, That in an Action upon the Case, it was good to say, That in consideration *de diversis summis Concessit solvere*: and so it hath been adjudged.

Trin: 21 Jacobi, in the Kings Bench.

HAWKSWITH and DAVIES Case. *Intratur.*

431.

Pasch. 19. Jur. Rot. 83.

LESSEE for years of divers parcels of Lands, reservant Rent, and for not payment a reentrie: The Lessee assigns part of the Land to *A.* and other part to *B.* and keeps a part to himself: afterwards the Lessee levies a Fine of all the Lands unto the use of the Conusee and his heirs; afterwards the Lessee paies the Rent for the whole unto the Conusee, and afterwards the Rent becomes behind; and the Conusee enters for the Condition broken, and made a Lease to the Plaintiff, who thereupon brought an *Ejectione firme*; and all this matter was found by special Verdict: and it was moved, that by the assigning of the Lessee of part of the lands to one, and part to another, that the Condition was gone and destroyed; but notwithstanding, it was agreed by all the Justices, that the Condition did remain, and was not gone nor destroyed. And they said that this Case was not like unto *Winters Case*, in *Dyer* 308, & 309. where the Lessor did assigne over part of the Reversion to one, and part unto another; for that in that Case the Lessor by his own Act had destroyed the Condition, but in this Case it is the Act of the Lessee,

Lessee, and therefore no colour that the Condition be gone and destroyed. And so it was resolved for the Plaintiffe, and Judgment given accordingly.

Trin. 21 Jacobi, in the Kings Bench.

432. KILLIGREW and HARPER'S Case.

HARPER in consideration of 100*l.* doth assume and promise to *Killigrew*, That the Lady *Weston* and her Son shall sell to *Killigrew* such Lands, *Proviso* that *Killigrew* such a day certain pay to the said Lady and her Son 2000*l.* At which time the Lady and her Son shall be ready to assure and convey to *Killigrew* the said lands; And for want of payment of the said 2000*l.* at the said day, that *Killigrew* shall lose the said 100*l.* and that the Contract for the Land shall be void. *Killigrew* brought an Action upon the Case *sur Assumpsit* against *Harper*, and all this matter was found by special Verdict. *Athow* Serjeant argued that the Action would lie, because the Lady and her Son were to do the first act, *viz.* to make the Assurance. 22 *H.6.57.* Rent is reserved upon a Lease for years in which are divers Covenants, and a Bond is given for the performance of all the Covenants within such Indenture of Lease: the Rent is behind, the Bond is not forfeited unless the Lessor doth make a demand of the Rent, because the Lessor is to do the first act, *viz.* to demand the Rent. *Yelverton contr'* That the Action will not lie. The question is, Of whose part is the breach? The *Assumpsit* is grounded upon the Consideration, and not upon the Promise: The Jury find that *Killigrew* was not ready to pay the 2000*l.* and that the Lady and her Son were not ready to assure the land. The Agreement was (for which not time is expressed) That the Lady and her Son should convey such lands: Then the Agreement was, That *Killigrew* should pay at such a day certain, at which day the Lady should be ready, &c. and if *Killigrew* made default of the payment of the 2000*l.* then he was to lose the said 100*l.* which he gave to *Harper* to procure the Bargain, and also that the Bargain should be void. *Ley* Chief Justice, If *Killigrew* had paid or tendred the 2000*l.* at the said day, and the Lady and her Son had not been ready at that time to have assured the lands, *Killigrew* should have had an Action upon the Case for the 100*l.* and recovered damages: If the Lady had been to have done the first action, then the Action would have been maintainable; but in this case *Killigrew* is to do the first act, and therefore the Action will not lie. *Dodderidge*, If it had been inde-

338 *St Arthur Gorge & St Robert Lane's Case.*

finite, then the Assurance and Conveyance is to be before the Payment; but here the bargain is to pay the money first. *Harper* promiseth to *Killigrew* in consideration of 100^l. that *Killigrew* shall buy such lands; then comes the time of payment, and assurance of the land at that time shall be made; *Proviso*, that if he do not pay the 2000^l. then *Killigrew* to lose the 100^l. and the Contract to be void: so there are two penalties; so as of necessity the 2000^l. must first be paid, for otherwise how can the Contract be void for not payment? For if the Conveyance shall be first made, then it was present before the money paid, and so the clause (*viz.*) *Then the Contract to be void*, should be of no effect. *Haughton* Justice agreed. *Chamberlain* Justice, You have bound your self with a penalty, and the bargain ought to be performed as it was made. And so being made, that the money should be first paid, at which time the conveyance shall be made; and for want of payment, that *Killigrew* should lose the 100^l. and also the Contract to be void: The opinion of the whole Court was against the Plaintiffe, that the Action would not lie; and so Judgment was given *Quod nihil capiat per Billam*.

Trin. 21 Jacobi, in the Kings Bench.

433. SIR ARTHUR GORGE and SIR ROBERT LANE'S Case.

AN Action of Debt was brought upon a Bond for not performance of Covenants. The Case was: *Lane* did marry with the daughter of *Gorge*; and in consideration of marriage, and also of 3000^l. portion given in marriage by *Gorge*, *Lane* did covenant, That he within one year would make a Jointure of lands within *England* then of the value of 500^l. per annum over and above all Reprises; to his said wife, so as *Sir Henry Yelverton* and *Sir John Walter* Councillors at Law should devise and advise. In Debt for the breach of these Covenants, *Lane* pleaded, That he did inform *Gorge* of lands which he was determined should be for her Jointure, but neither *Yelverton* nor *Walter* did devise the Assurance. *Paul Crook* did demur upon the Plea; and first shewed, That *Lane* did not give notice to *Yelverton* and *Walter*, as he ought to have done by law: For in this case it is not sufficient to give notice to *Gorge*, but the notice ought to be to the Councillors, otherwise how could they devise the assurance for her jointure? 2. Heer is no place named where the Notice was, for it is issuable whether he gave Notice or not; and then there being no certain place named, no *visue* can be upon it.

3. He

S^r Arthur Gorge & S^r Robert Lane's Case. 339

3. He doth not shew where the Lands are ; for it might be (as in truth it was) the Lands were out of *England*, and by the Covenant they ought to be within *England*. 4. He doth not shew that the Lands were of the value of 500*l. per annum* over and above all Reprises, as they ought to be by the Articles. 5. He sheweth that they were his Freehold, but doth not shew that the lands were his lands of Inheritance of which a Jointure might be made. The opinion of the whole Court was, that the Exceptions were good, and that the Plea in bar was no good plea. *Dodderidge*, If the words had been (*Such as his Councel shall devise*) then the Notice ought to have been given to the party himself, and he is to inform his Councel of it, 6 *H.7.8.* But here two Councellors were named in certain, and therefore the Notice ought to be given to them, for he hath appointed Councellors. The whole Plea in bar is naught ; For if he hath an estate in tail, then there ought to be a Fine in making of the Jointure ; and if there be a Remainder upon it, then there ought to be a Recovery : So because that *Lane* hath not informed the party what estate he had in the lands, they could not make the Assurance. *Ley* Chief Justice. Where a man is bound to make such Assurance of lands as *J.S.* shall advise, here he need not shew his Evidences, but he ought to shew to the party what the land is, and where it lieth and the Obligee is to seek out the estate at his peril : And then *J.S.* may advise the Assurance conditionally, *viz.* That if he hath Fee, then to have such an assurance ; and if an Estate in tail, then such an assurance ; and if there be a Remainder over, then to devise a Recovery. *Curia*, All the Errors are material.

The Bail for *Lane*, before any Judgment given against him, brought *Lane* into Court, and prayed that they might be discharged, and *Lane* taken into custody. *Dodderidge* Justice said, There is a difference betwixt *Mannaptors*, which are that the party shall appear at the day, for there the Court will not excuse them to bring the party in Court before the day : But in case of Bail, there they may discharge themselves if they bring the body of the Defendant into Court at any time before the Return of the 2. *Scire facias* against the Defendant : For when one goeth upon Bail, it is intended that he notwithstanding that is in *custodia Mariscalli* ; For the Declarations are in *custodia Mariscalli Marschalls*. *Quod nota*, so is the difference.

Trin. 21 Jacobi, in the Kings Bench.

434. *WHEELER and APPLETON's Case*

AN Action upon the Case was brought for these scandalous words, *viz. Thou hast stolen my Perce, and I will charge thee with suspicion*
X x 2 of

of Felony: Which were found for the Plaintiffe. It was moved for the staying of Judgment, That the Action was not maintainable: For the Declaration is *A Peece, innuendo a Gun*: And here the *innuendo* doth not do its part; for it might be a peece of an Oak, or a 2^{2s}. peece of Gold, which is commonly called a Peece; and in this Case the words may be intended such a Peece. 17 *Jacobi* in the Kings Bench, betwixt *Palmer* and *Reve*: *Thou hast the Pox, and one may turn his finger in the holes of his legs*: Adjudged that for these words the Action would lie, because it cannot be meant otherwise then of the French pox. 41 *Eliz* in the Kings Bench, the Defendant said of the Plaintiffe, *Thou art forsworn, and thou hast hanged an honest man then thyself*: the Action did lie. For the first words, *Thou art forsworn*, no Action will lie, C.4. part 15. but the later words prove that it was in course of Justice, and that he was perjured. So in this Case, admitting that the first words will not bear an action, yet the later words make them actionable; For the first words ought to be meant of a thing which is Felony. *Heck's Case*, C.4. part 15. there it was adjudged for the Plaintiffe, although the first words would not bear action, yet the later words make them actionable. *I will charge thee with suspicion, or flat Felony*, an Action doth not lie, *Heck's Case* proves it. Another Councillor argued that the Action would not lie: The first words are not actionable; For so many things as there are in the world, so many peeces there may be, and here it might be a peece of a thing which could not be Felony. Betwixt *Roberts* and *Hill*, 3 *Jacobi* in the Kings Bench it was adjudged, *Roberts hath stolen my wood*, the words were not actionable; for it might be wood standing, and then to cut and take it away it is not Felony, but Trespass. *Lej* Chief Justice, *I charge thee with flat Felony*, If the words be spoken privately to a man no Action lieth for them; but if they be spoken before an Officer, as a Constable, or in a Court which hath consufance of such Pleas, then the Action will lie, for the party by reason of such words may come into trouble: But if a man charge one with flat Felony, and chargeth the Constable with him, then an Action will not lie, because it is in the ordinary course of Justice. C.4. part 14. If a man maketh a Bargain with another to pay him twenty Peeces for such a thing, it shall be taken by common intentment twenty 22^s. peeces of gold, which vulgarly are called Peeces. But to endite a man for 20 Peeces is not certain and therefore such Indictment is not good; and the Action in our Case will not lie, for (*my Peece*) is an incertain word. *Dodderidge*. *Thou hast stolen my Peece*, What is that? For we call 22^s. in gold a Peece. You ought to tell it in certain: And here the *innuendo* will not make the scandal, but the words of scandal ought to proceed out of the parties own mouth; and an *Innuendo* cannot make that certain, which was uncertain in the words of the speaker: And therefore the Action here will not lie. *Haughton* Justice, If the whole matter had been set forth in the Declaration,

ration, as to have shewed that the parties before this speech had had speeches of a Gun. then the Action in this case would have been maintainable; but here, the word (Peece) is incertain, and the Action will not lie. *Chamberlain Justice*, If the speeches had been concerning a Gun lost, then upon these words spoken the Action would have lien, but not as they are here spoken; For the two words there, ought to have been matter subsequent, as upon the charging with Felony, to have delivered him to an Officer. And so by the whole Court it was adjudged, *Quod querens nihil capiat per Billam.*

Trin. 21 Jacobi, in the Kings Bench.

435. SHOETER against EMET and his WIFE:

THe plaintiff being a midwife, the Defendants wife said to the plaintiff, *Thou art a Witch, and wert the death of such a mans child, at whose birth thou wert Midwife.* In an Action upon the Case in Arrest of Judgment it was moved, that the words were not actionable. *Hill 15 Jacobi*, in the Common Pleas: *Stone and Roberts* Case adjudged, That an Action upon the Case doth not lie for saying thou art a Sorcerer, *9 Jac. Godbolds* Case in the Kings Bench, *Thou art a Sorcerer or an Inchanter.* *30 Eliz. betwixt Morris and Clark*, for saying, *Thou art a Witch*, no Action will lie; for of the words Witch, or Sorcerer, the Common Law takes no notice; but a Witch is punishable by the Statute of *1 Jacobi*, cap. 12. *Pasch. 44 Eliz. Lowes* Case, *Thou hast bewitched my cattel, or my child*; there because an Act is supposed to be done, an Action upon the Case will lie for the words. *1 Jacobi*, *Sir Miles Fleecewoods* Case, He was Receiver for the King in the Court of Wards; and Auditor *Curle* said of him, *Thou hast deceived the King*; and it was adjudged, that an Action upon the Case would lie for the words, because it was in his calling by which he got his living. *Chamberlain Justice*, Since the Statute *1 Jacobi*, for calling one Witch generally an Action will lie; For, for the hurting of any thing, a Witch is punishable by shame, viz. Pillory in an open place. *Dodderidge Justice*, Thief or Witch will bear Action; and the reason of the Case before cited by the Council is, because that the common Law doth not take notice of a Witch: But punishment is inflicted upon a Witch by the Statute of *1 Jacobi*, and by that Statute a Witch is punishable. *Trin. 21 Jacobi*, *Betwixt Mellor and Hern*, Judgment was stayed where the words were, *Thou art a Witch, and hast bewitched my child*, because that the words shall be taken in *mitiori sensu*, as thou hast bewitched him with pleasure. And in that sense *Saint Paul* said, *Who hath bewitched you, O Galatians!* That case was adjudged in the Common Pleas. *Trin.*

Trin. 21 Jacobi in the Kings Bench.

436.

KNOLLIS and DOBBIN's Case.

K Nollis did assume and promise *apud London*, within such a Parish that he would cast so much Lead and cover a Church in *Ipswich* in *Suffolk*, and one *Scrivener* promised him to give him 10*l.* for his costs and pains: *Scrivener* died, *Knollis* brought an Action upon the Case against *Dobbins* who was Administrator of *Scrivener*, and declared that he such a day did cast the Lead and cover the said Church, *apud London*. The Defendant pretended that the Intestator made no such promise, and it was found for the Plaintiff: and in arrest of Judgment it was moved, That the Declaration was not good, by reason that the Agreement was to cover a Church in *Ipswich*, and he declared he had covered such a Church *apud London*, which is impossible, being 60 miles asunder; and so the Declaration is not pursuing the promise. *Dyer* 7 *Eliz.* 233. In Avowry for Rent upon a Lease for life, &c. That the Prior and Covent of &c. at *Bathe*, demised Lands which was out of *Bathe*, it was void; for they being at *Bathe*, could not make Livery of Land which was out of *Bathe*. *Vi. Dyer* 270. The second Exception to the Declaration was, That the Commissary of the Bishop of *Norwich* *apud London*, did commit Administration of the Goods and Chattels of *Scrivener* to *Dobbins* *apud London*, which was said not to be good, because he had not power in *London* to execute any power which appertained unto him at *Norwich*. *Dodderidge* Justice, The plaintiff declares that *apud London* he did cover the said Church, that is not good, and makes the Declaration to be insufficient, because it is not according to the promise. The place where the Commissary of the Bishop of *Norwich* did grant the Administration is not material; For if the Bishop of *Norwich* be in *London*, yet his power as to granting of Letters of Administration, and making of Deacons and Clerks in his own Diocese, doth follow the person of the Bishop, although his other Jurisdiction be Local, to which the Court agree. And it was adjudged that the Declaration was not good, and therefore Judgment was given *Quod querens nihil capias per Billam*.

Trin.

Trin. 21 Jacobi, in the Kings Bench.

437.

BULLEN and SHEENE's Case.

SHeene brought a Writ of Error upon a Judgment given in the Common Pleas. The Case was, *Bullen* being a Commoner, intituling himself by those whose Estate he had in the Land, brought an Action upon the Case against *Sheene*, because he had digged clay in the land where the Plaintiff had Common, and had carried away the same over the Common, *per quod* he lost his Common, and by that could not use his Common in as ample manner as he did before. *Sheene* entituled himself to be a Commoner, and have common in the said land also, and so justified the Entry, and set forth a prescription, That every Commoner had used to dig clay there, and the first issue was found for the Defendant *Sheene*, viz. that he was a Commoner; but the other issue was found for the Plaintiff *Bullen*, viz. that there was no such prescription, That a Commoner might dig clay: And the Jury did assesse damages to the Plaintiff generally; and the same was moved to be Error, because that the Plaintiff had not damage by carrying away of the clay, because the same did not belong to him, for that he was but a Commoner; and so the Judgment given in the Court of Common Pleas was Erroneous. *Lez* Chief Justice, By the digging of a pit the Commoner is prejudiced by the laying of the clay upon the Common the Commoner is prejudiced, and so the damages are given for the digging and carrying away of the clay, *per quod Commoniam suam amisit*, and the damages are not given for the clay. *Chamberlain* Justice, If he had suffered the clay to lie by the pit, it had been damage to the Commoner. If the Owner of the soil plough up or maketh conyburies in the Land, an Action upon the case lyeth against him by the Commoner, for thereby the Common is much the worse, and the Commoner prejudiced. If the pit be deep, it is dangerous to the Commoner, and so a damage unto him, for it is dangerous lest his cattel should fall into it, and it will not suddenly be filled up again, and so no grafs there for a long time, and the longer, because that which should fill up the pit is carried away. *Haughton* Justice, The proceedings are Erroneous, both Plaintiff and Defendant are Commoners, The wrong is in two points. First, That the Defendant had with his cattel fed the Common: Secondly, That the Defendant had digged clay there, and carried the same away; The Defendant makes Title to both: First he prescribes to have Common there; Secondly,

Secondly, That the Commoners by prescription have used to have and dig clay there. The first point is found for the Defendant, and the last issue is found against the Defendant, and damages are given generally: All the question is upon the Declaration *Cæpit & asportavit* the clay, which implies a propertie and interest in the clay to be to the Plaintiff. It is not said that the clay was carried over the land; I conceive that the property of the clay is in issue, and the Commoner hath nothing to do with that: So damages being given to him for that which doth not belong unto him, I hold the Judgment to be Erroneous, and that it ought to be reversed. *Dodderidge*, The Declaration is well enough, and of necessity it cannot be otherwise: Here the Plaintiff challengeeth nothing but Common; In an Action upon the Case there ought to be injurie and damage, which is the consequent upon injurie; For an Action upon the Case will not lie for an injurie without damage. Here *Bullen* doth not complain for any thing but the loss of his Common, which is the first wrong: The second wrong is the digging of the pit, in the which his cattel may fall and perish: The third wrong is, for carrying away of six loads of clay over the Common, which is a great detriment to the Common, to carrie it either by Carts or otherwise: and for these three wrongs he concludes his damages, *ratione cuius* he could not have his Common in as ample manner as before he was used to have it, and he doth not conclude any damage for the clay: Every one of these injuries doth increase the damages, and so it would have been if he had left the clay to lie upon the land by the pit; for thereby so much Common would have been lost. Here he makes himself title only to the Common, and these Acts do increase the damages only. 2 *E.4.* & 7 *E.4.* Where one was unlawfully and falsly imprisoned, and being imprisoned, compelled to levie a Fine or make a Feoffment, or other Deed. In an Action of false Imprisonment the Jurie gave damages, by reason of his restraint of his Liberty, and increased them by reason of the levying of the Fine, or making the Feoffment or other Deed, which he then made. The Jurie found that he is not to have any clay, and *cæpit & asportavit* doth not alter the Case; for that is a special Action of trespass. And by three of the Justices against *Haughton*, the Judgment given in the Court of Common Pleas was affirmed.

Trin. 21 Jacobi, in the Kings Bench.

438.

C*Althrope* Councillor, cited this Case to have been adjudged, 25 *Eliz.* The husband seised in the right of his wife of Copyhold Land,

Land, made a Lease for years; and it was holden by the Court then, That by the death of the husband the forfeiture of the Copyhold was purged, and that the wife should have the land again, notwithstanding this forfeiture by the husband, by making a Lease for years without Licence: And the Court seemed to allow of the said Case to be Law. And afterwards, this very Term the like Case came in question in this Court, betwixt *Severne* and *Smish*, where in an *Ejectione firme*, a special Verdict found, That a Copyholder seised in the right of his wife, made a Lease for years; and it was a question whether it were a forfeiture of the inheritance of the wife. *Hitcham* Serjeant said it was no forfeiture: *Dodderidge* Justice took this difference, Where a *Feme Sole* is a Copyholder, and she takes a husband, who makes a lease for years without licence, the same is a forfeiture, because it is her folly to take such a husband as will forfeit her Land: But where a Copyhold is granted to a *Feme Covert*, and the husband maketh a Lease without Licence, in such case it is no forfeiture; and so in the Case of a *Feme Lessee* for life at the Common Law, against *Whitinghams* Case, C. 8. part 44. It was adjourned.

Trin. 21 Iacobi, in the Kings Bench.

439.

Note, It was the opinion of all the Justices, and so declared, That if the Plaintiffe in an *Ejectione firme* doth mistake his Declaration, That the Defendant in such Case shall have his Costs of the Plaintiffe, by reason of his unjust vexation.

Trin. 21 Iacobi, in the Kings Bench.

440.

Four several men were joyntly Indicted for erecting and keeping of four several Inns in *Batho*; It was moved that the Indictment was insufficient, because the offence of the one is not the offence of the other, like unto the Case in *Dyer* 19. Where two joyn in an Action upon the Case for words, 'tis not good, but they ought for to sever in their Actions, because the wrong to the one, is no wrong to the other. *Dodderidge* Justice, One Indictment may comprehend several offences, if they be particularly laid, and then it is in Law several Indictments: It

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may be intended that the Inns were lawfull Inns; for it is not laid to be *ad nocumentum*, and therefore not punishable; but if they be an annoyance and inconvenient for the Inhabitants, then the same ought particularly to appear, otherwise it is a thing lawfull to erect an Inn. An Action upon the Case lyeth against an Inn-keeper who denies lodging to a Travailer for his money, if he hath spare lodging, because he hath subjected himself to keep a common Inn. And in an Action upon the Case against an Inn-keeper, he needeth not to shew that he hath a Licence to keep the Inn.

If an Inn-keeper taketh down his Signe, and yet keepeth an Hosterie, an Action upon the Case will lie against him, if he do deny lodging unto a Travailer for his money; but if he taketh down his Signe, and giveth over the keeping of an Inn, then he is discharged from giving lodging. The Indictment in the principal case is not good, for want of the words (*ad Nocumentum*.) *Haughton and Ley* Iustices agreed. *Ley*, If an Indictment be for an Offence which the Court *ex Officio*, ought to take notice to be *ad Nocumentum*, there the Indictment being general, *ad Nocumentum & contra Coronam & dignitatem*, is sufficient, without shewing in what it is *ad Nocumentum*. But for Inns, it is lawfull for to erect them, if it be not *ad Nocumentum*, &c. and therefore in such Indictments, it ought to be expressed that the erecting of them is *ad Nocumentum*, &c. and because in this Case there wants the words *ad Nocumentum*, the Indictment was quashed. *Fi.* The Lord North and Pratt's Case before to this purpose.

Trin. 21 Jacobi, in the Kings Bench.

441.

BRIDGES and NICHOLS'S Case.

They were Indicted for the not repairing of such a Bridg, and the Indictment was, *debent & solent reparare pontem*, &c. It was moved that the Indictment was insufficient, because it is not alledged in the Indictment, that the the Bridg was over a Water, and no needfull that it be amended. Secondly, It did not appear in the Indictment, that at the time of the Indictment the said Bridg was ruinous and decayed. Thirdly, The Indictment is, that *Bridges and Nichols, debent & solent reparare pontem*, and it is not shewed that their charge of repairing of the same is *ratione renare*. 21 E. 4. 38. Where it is said, That a prescription cannot be, that a common person ought to repair a Bridg, unless it be

Sr Thomas Lee and Grissel's Case. 347

be said to be by reason of his Tenure; but it is otherwise in case of a Corporation. For these Errors the Indictment was quashed by Judgment of the Court.

Trin: 21 Jacobi, in the Kings Bench.

Intratur, Trin. 20. Rot. 1609.

442. Sir THOMAS LEE and GRISSSEL's Case.

G *Rissel* brought an Action upon the Case against *Lee* in the Common Pleas, and shewed that *diu fuit, & adhuc seifitus existens* of a house &c. and he did prescribe that he and all those whose Estate he hath in the said house, &c. had used to have Common in the waste of *L.* and that *Lee* in *Jacobi*, made Coniburies in the waste, *quorum quidem premissorum* he lost his Common. The Action was brought 18 *Jacobi*, and Judgment given in the Common Pleas for the Plaintiffe there: and thereupon a Writ of Error was brought in the Kings Bench, and it was assigned for Error,

First, That (*diu seifitus*) is not good; because it hath not any limitation of time, for it may contain as well forty years as one year: He laid the wrong to be 15 *Jacobi*, and doth not shew that at that time he was seised, for (*diu*) doth not expresse any certain time; and then it is like unto the case of Waste, where the Grantee of a Reversion brings an Action of waste, and doth not shew that he committed waste to his disinheritance, but doth not shew when the waste was done; for it might be that it was done betwixt the Grant and the Attornment, and then he had no cause to have waste; or otherwise it might be that the waste was done in the time of the Grantor, and then the Grantee had no cause of Action; But in such case he ought to have shewed that he was seised of the Reversion at the time of the waste done. 4 E. 4. 18. There Trespass was brought upon the Statute of R. 2. and the Writ was, That he did enter in *diversa terras & tenementa*, There it was holden that the Writ being insufficient, the Court should not make it good, because it is too general. In our Case it ought to have been, that he was (*diu*) & *adhuc est seifitus, Et sic seifitus*, that the Defendant did do the wrong.

Another Error was assigned because he doth not conclude, *quorum quidem premissorum pratextu*, he lost his Common; but he saies *quorum quidem premissorum* he lost his Common; and leaves out the word

(*prætextu*) which word ought to have been in the Declaration. The Action is brought three years after the wrong done, and he ought to have shewed, that he is *Jacobi* (which was the time of the wrong done) *fuit seifitus*, & *diu ante fuit seifitus in dominico ut de feodo*.

All before the clause, *quorum quidem*, &c. is but collection; and he ought to have concluded with a cause of grievance, viz. *quorum quidem premissorum prætextu*, he lost his Common. 7 H. 7. 3. There it is said that this word (*prætextu*) is a conclusion that the particuler wrong doth contain, and doth affirm that which went before; but in this case the word (*prætextu*) is wanting, and a Seisin first ought to be laid, and then *prætextu quorum* is good. *Vi. Bullen and Sheenes case* before, where the Plaintiff first made him title to the Common, viz. that he was such a time seised in Fee, & *adhuc seifitus existens*, that the Defendant did dig clay: *Vi. Brown and Greens Case* in the Common Pleas. 40 Eliz. Where a man pleaded a Feoffment and Livery, *Virtute cuius* he was seised in fee, and did not shew that he entred, and yet the same was good, because the *Virtute cuius* was a good conclusion. *Ley Chief Justice*, (*diu*) doth not denote any time certain; If in a Case it had been *postea*, or *sic inde seifitus*, the Defendant did the wrong, then the Declaration had been good; but here is nothing to which *diu* may have reference: If he had said, that he being (*diu seifitus*) that the Defendant had such a day done the wrong, it had been good.

Secondly, Here ought to have been either *quorum quidem premissorum ratione*, or *prætextu*, he lost his Common: here the *Latine* is good, viz. *quorum quidem premissorum Commoniam perdidit*, but it is not good in Law. *Dodderidge Justice*, You ought to have coupled the damage and the wrong; and in this case there wants the coupling, for want of the word (*prætextu*) for the word (*prætextu*) is the application of the precedent matter: The matter of wrong is the making of the conyuries, by reason of which he lost his Common: and the *quorum quidem* here hath not any sense: The Declaration wants matter of form also; *diu fuit seifitus & adhuc seifitus existens*. Might you not have purchased this Common after the wrong done by the making of the conyuries? for it doth not appear otherwise by the Declaration; for as well as (*diu*) may comprehend forty years, so it may but one moneth. If it had been (*diu seifitus & sic seifitus*) that he made the conyuries, then the Declaration had been well; but as this case is, it is not good. *Haughton Justice*, Your Action ought to have contained your matter of time, as well as your matter of wrong. (*Diu*) includes no certainty of time; and *quorum quidem premissorum*, &c. is a speech without sense. If a man maketh title to have Common *pro omnibus averiis*, and the word (*suus*) is omitted, it is not good.

Ley Chief Justice, here the wrong and damage are not knit together by these words; and it might be that in this case he had lost his Common

Common by some other means: For he doth alleadge that he lost his Common; but how he lost it, that doth not appear to us. If he had said, *Virtute cuius*, or *per quod*, or *ratione cuius* he had lost his Common, then the Declaration had been certain, and had been well enough: But here it being incertain, both in the *Seisitur*, and also in the alleadging the damage, The Judgment given in the Court of Common Pleas for these Errors was reversed.

Trin. 21 Jacobi, in the Kings Bench.

443. *PYE and BONNER's Case.*

AN Information was in the Common-Pleas by *Pye* against *Bonner*, for buying of Cattel & selling of them again in the same Market, against the Statute. Which was found against the Defendant; and the Judgment was entered *Quod sit in misericordia*, whereas it ought to have been *Capiatur*, being upon an Information; For it is a Contempt, and punishable by Imprisonment. And in this Case upon a Writ of Error brought in the Kings Bench, by the opinion of the whole Court the Judgment was reversed.

Trin. 21 Jacobi, Intratur Hill. 20 Jac.

Rot. 137. in the Kings Bench.

444. *KITE and SMITH's Case.*

ONE Recovered by Erronious Judgment; and the Defendant did promise unto the Plaintiffe, That if he would forbear to take forth Execution, that at such a day certain he would pay him the debt and damages. And Action upon the Case was brought upon that Promise. And now it was moved by the Defendants Council, That there was not any Consideration upon which the Promise could be made, because the Judgment was an Erronious Judgment. It was adjourned. But I conceive, that because it doth not appear to the Court but that the Judgment is a good Judgment, that it is a good Consideration: Otherwise, if the Judgment had been reversed by a Writ of Error before the Action upon the Case brought upon the Promise; for there it doth appear judicially to the Court, that the Judgment was Erronious.

Trin.

Trin. 21 Jacobi, in the Kings Bench.

445. TOTNAM and HOPKIN'S Case.

AN Action upon the Case was brought upon an *Assumpsit*: And the Plaintiff did declare, That in Consideration of &c. the Defendant *1 Martii* did promise to pay and deliver to the Plaintiffe 20 Quarters of Barley the next Seed-time. Upon *Non Assumpsit*: pleaded it was found for the Plaintiffe. It was moved for the Defendant, That the Plaintiffe ought to have shewed in his Declaration when the Seed-time was, which he hath not done. But it was answered, That he needeth not so to do, because he brings his Action half a year after the Promise, for not payment of the same at Seed-time, which was betwixt the Promise and the *Assumpsit*. Dodderidge Justice, If I promise to pay you so much Corn at Harvest next, If it appeareth that the Harvest is ended before the Action brought, it is good without shewing the time of the Harvest, for it is apparent to the Court that the Harvest is past: And here the Action being brought at *Michaelmas*, it sufficiently appears that the Harvest is past. And Judgment was given for the Plaintiffe.

*Trin. 21 Jacobi, Intratur Hill. 17 Jacobi, Rot. 652.
inter Hard & Foy, in the Kings Bench.*

446. KELLAWAY'S Case.

IN an *Ejectione Firme* brought for the Mannor of *Lillington* upon a Lease made by *Kellaway* to *Foy*, It was found by a special Verdict, That *M. Kellaway* seised of the Mannor of *Lillington* in Fee, holden in Soccage did devise the same by his Will in writing in these words, viz. For the good will I bear unto the name of the *Kellawayes*, I give all my Lands to *John Kellaway* in tail, the Remainder to my right Heirs, so long as they keep the true intent and meaning of this my Will. To have to the said *John Kellaway* and the heirs of his body, untill *John Kellaway* or any of his issues go about to alter and change the intent and meaning of this my Will. Then, and in such case it shall be lawfull to and for *H. Kellaway* to enter and have the Land in tail with the like limitation. And so the Lands was put

put in Remainder to five several persons, the Remainder to the right heirs of the Devisor. *M. Kellaway* dyed without issue, *John Kellaway* is heir, and entred and demised the same to *R. K.* for 500 years, and afterwards granted all his estate to *Hard.* Afterwards *John Kellaway* did agree by Deed indented with *W. K.* to levy a Fine of the Reversion to *W.* and his heirs. *H. Kellaway* entred according to the words of the *Proviso* in the Will, and made the Lease to *Foy*, who brought an *Ejectione Firme* against *Hard.* And whether *H. Kellaway* might lawfully enter or no was the Question. It was objected, That in the Case there is not any Forfeiture, because the Fine was without proclamations, and so it was a Discontinuance only. The first Question is, If the Remainder doth continue: The second is, If it be a Perpetuity, or a Limitation. *John Kellaway* is Tenant in tail by Devise, untill such time as *John Kellaway* or any of his issues agree or go about to alter or change the estate tail mentioned in the Will; with *Proviso* to make Leases for 21 years, 3 lives, or to make Jointures: Then his Will is, That it shall be lawfull for *H. K.* to enter and to have the Land with the same limitations. If it be a Perpetuity, then it is for the Plaintiffe; but if it be but a Limitation, then it is for the Defendant. The Fine was levied without proclamations, and *H. K.* entred for the Forfeiture.

Dampart; It is no Perpetuity, but a Limitation, which is not restrained by the Law as Perpetuities are, Untill such time as &c. shall discontinue &c. The Jury find an Agreement by Indenture: The act which is alledged to be the breach is, *Conclusioit & agreavit*, not to levy a Fine with proclamations, but to levy a Fine without proclamations, which is but a Discontinuance. *Telverton*, If the Fine had been with proclamations, then without doubt he in the Remainder during the life of him who levied it had been barred. The Devise was, To have to them and to the heirs of their bodies, so long as they and every of their issues do observe, perform, fulfill and keep the true meaning of this my Will touching the entailed Lands inform following, and no otherwise: And therefore I *M. Kellaway* do devise unto *John Kellaway* & the issue of his Body the Remainder &c. To have to the said *John Kellaway* and the issue of his body, untill he or any of his issue shall go about to conclude, do, or make any act or acts to alien, discontinue, or change the true meaning of this my Will. That then my Will is, and I do give and bequeath to *H. K.* in tail, And that it shall be lawfull for him the said *H. K.* or his issue to enter immediately upon such assent, conclusion, or going about to conclude &c. And that *H. K.* and his issue shall have it untill he or any of them go about &c. C. 9. part, *Sundays Case*, 128. where it was resolved, That no Condition or Limitation, be it by act executed, or by limitation of an Use, or by a Devise, can bar Tenant in tail to alien by a common Recovery. C. 30. part 1. The Case was not resolved, but it was adjourned to another day to be argued, and then the Court to deliver their opinions in it.

Trin.

*Trin. 21. Inratur Trin. 20 Jacobi, Rot. 811.
in the Kings Bench.*

447.

KNIGHT'S CASE.

IN this Case *George Crook* said, That Land could not belong to Land : yet in a Will, such Land which had been enjoyed with other, might pass by the words *cum pertinencia*. As where *A.* hath two houses adjoyning, viz. the *Swan* and the *Red-Lyon*; and *A.* hath the *Swan* in his own possession, and occupieth a Parlour or Hall (which belongs in truth to the *Red-Lyon*) with the *Swan*-house, and then leaseth the *Red-Lyon* house, and then by his Will deviseth his houses called the *Swan*; The rooms of the *Lyon* which *A.* occupied with the *Swan* shall pass by the Devise, although of right those rooms do belong to the *Lyon*-house. *Pasc. 36 Elix. Ewer and Heydon's Case.* A man hath a house and divers lands in *W.* and also a house and lands in *D.* And by his Will he deviseth his house and all his lands in *W. & D.* there the house which is in *D.* doth not pass, for his intent and meaning plainly appears that his house in *D.* doth not pass: But if he had devised all his lands in *W.* and had not spoken of the house, the house had passed. A Case was in the Common-Pleas betwixt *Hyam* and *Baker*: The Devisor had two Farms, and occupied parcel of one of the Farms with the other Farm, and devised the Farm which he had in his possession; The part of the other Farm which he occupied with it, did pass with the Farm devised.

Dodderidge Justice, The Devise is in the Case at Bar: All his Farm called *Locks* to his eldest Son, and all his Farm called *Brocks* to his younger Son; And the Land in question was purchased long after that the Devisor purchased *Brocks*; but that Land newly purchased was not expressly named in the Will, and therefore it shall descend to the heir, viz. the eldest Son. Land is not parcel of a house, and in strictness of Law cannot appertain to a house: Yet Land is appertaining to the Office of the *Fleet* and the *Rolls*; but that is to the Office, which is in another nature then the Land is. For the Land newly purchased, (the Jury did not find the same to be usually occupied with *Brocks*) it shall not pass with *Brocks*, although it be occupied together with *Brocks*. I do occupie several Farms together, and then I devise one of the Farms called *D.* and all the lands to the same belonging; the other Farms shall not pass with it, although they be occupied all together. *Haughton Justice*, What time will make lands to belong unto a house? All the profits

*Expressum facit
estiam in litem*

Sely against Flayle and Farthing. 333

fits of the lands used with the house for a small time will serve the turn. *Ley* Chief Justice, There are two manner of belongings; One belonging in course of Right, and another belonging in case of Occupation. To the first belonging there ought to be Prescription, viz. time out of mind: But in our Case, Belonging doth borrow some sense from occupying for a year, or a time; And then another year to occupie it will not make it belonging in the later sense. In strictness of Law, Land cannot be said to belong to a house, or land; but in vulgar reputation it may be said belonging: And in such case, in case of grant, the Land will not pass as appertaining to Land, *C. 4. part. Terringham's Case*. But in our Case, it is in case of a Will. Usually occupied, is not to be meant time out of mind. Here other lands were belonging to *Brocks*; and so the words of the Will are satisfied. But it might have been a Question, if there had been no other lands belonging to it. *Dodderidge* Justice, If the Devisor had turned all the profits thereof to *Brocks*, then it had passed by the Will. *Ley* Chief Justice, This occupying of it promiscuously doth make it belong to neither.

At another day, *Ley* Chief Justice said, Here is nothing which makes it appear to us that this Land doth belong to *Brocks*: For the Jury find not that it was occupied either with *Brocks* or *Locks*; and so this Land belongs to neither of them. *Dodderidge*, There is not any Question in the Case: It is not found that it doth belong; And then we must not judge it belonging. The ground of this Question ariseth out of the matter of fact; and it ought to be found at the least, that it is appertaining in Reputation. *Haughron*. The Jury find that *Knights* was seised of *Brocks* and of lands belonging to it, And that he was seised of *Locks* and of lands belonging to that, And lastly they find that he was seised of this Land in question, but they do not find that it was any wayes belonging to *Brocks* or *Locks*. It was adjudged for the Plaintiff, and that the Land did not pass by the Devise, but that it did descend to the heir.

Trin. 21 Jacobi, in the Kings Bench.

448. SELY against FLAYLE and FARTHING.

IN an *Ejectione Firme* the Verdict was found for the Defendant. Three of the Jurors had Sweet-meats in their pockets; and these three were for the Plaintiff, untill they were searched and the Sweet-meats found with them, and then they did agree with the other nine, and gave their Verdict for the Defendant. *Haughron* Justice, It doth not appear that

these Sweet-meats were provided for them by the Plaintiff or Defendant; and it doth not appear that the said three Jurors did eat of the Sweet-meats before the Verdict given: And so I conceive there is not any cause to make void the Verdict given; but the said three Jurors are fineable. *Dodderidge* Justice, Whether they eat or not, they are fineable for the having of the Sweet-meats with them, for it is a very great misdemeanour. And now we cannot tell which of the Jurors the three were; and because it was not moved before the Jurors departed from the Bar, it is now too late to examine the Jurors, for we do not know for which three to send for. The nine drew the three which had the Sweet-meats to their opinions, and therefore there is no cause to stay Judgment: But if the three Jurors had drawn the nine other to them, then there had been sufficient cause to have stayed the Judgment; but as this case is there is no cause. And therefore *per Curiam* Judgment was given for the Defendant according to the Verdict.

Trin. 21 Iacobi, in the Kings Bench.

449.

NOte, It was vouched by *George Crook*, and so was also the opinion of the whole Court, That by way of Agreement Tythes may pass for years without Deed, but not by way of Lease without a Deed. But a Lease for one year may be of Tythes without Deed.

Trin. 21 Iacobi, in the Kings Bench.

450.

THE Plaintiff recovered in Debt in the Kings Bench, and a *Capias* *ad Satisfaciendum* was awarded; and immediately upon the awarding of the *Capias* the Defendant dyed. *Quare* if in such case an Action of Debt lieth against the special Bail. (The Executors having nothing, a *Scire facias* doth not lie against the Bail.) And in the Common-Pleas in that case the Court was divided, two Judges being against the other two Judges. *Ideo quare.*

Trin.

Trin. 21 Jacobi, in the Kings Bench.

451.

LEONARD'S CASE.

IN a *Scire facias* to have Execution of a Recognizance, the Case was, That a special *Supplicavit* for the Peace was directed out of the Chancery to *A.* and *B.* Justices of the Peace, and to the Sheriffe of the County of *Essex*. to take a Recognizance of *L. M. & N.* for the Peace and good behaviour; and the Commission was to *A. B.* and the Sheriffe, & *cuiuslibet eorum*. The *Supplicavit* was delivered to the two Iustices, who took a Recognizance from *L.* but *M. & N.* could not be found: The Sheriffe was afterwards out of his Office, because his year of Sheriffwick expired. The new Sheriffe made a Return, That *M. & N.* non sunt inventi in balliva mea; And also Returned, That *A. & B.* had taken a Recognizance of *L.* as appeareth per quandam schedulam huic annex. in hac verba &c. This Case was argued, and 21 H. 7. 20. & 21. vouched, That if the Writ be first delivered to the Sheriffe, then he only is for to execute the Writ, and return the *Supplicavit*: But if it be first delivered to the Iustices, then they ought to execute it and return it. 9 E. 4. 31. A *Supplicavit* is a Iudicial Writ, and cannot be executed by a Deputy; but a Ministerial Writ may be executed by a Deputy. In this case the succeeding Sheriffe did return the Writ, and it was not directed unto him: And the same being delivered to the Chancellor, whether the same should be a Record or not was the Question. 4 H. 7. 17. Debt was brought upon an Obligation; The Kings Serjeant prayed the Bond for the King, because that the Plaintiffe was a person Outlawed.

Bryan Iustice, You ought to bring a Writ of Detinue to recover the Bond, which is a legal course for the King: And so in this case here is no Record for the King, because the Recognizance comes not in by a legal course, viz. a lawful Return; for it was returned by the new Sheriffe, and also by him who did not execute the Commission. *Heath* said cleerly, There was no Record for the King, and vouched 21 H. 7. 20, 21. Note the whole Case there. 1. Where it is said, *In casu superiori ipse Iusticiarius qui primo illud breve de Supplicavit recepit, tota executione ejusdem Brevis tantummodo teneatur, & reliqui sociorum suorum tangent. dictum Breve exonerentur, & Iusticiarius hanc recipiens nomine suo proprio illud retornabit.* And in our Case it was directed to the Sheriffe and Iustices; and being delivered to the Iustices, the Sheriffe had not to do to make Certificate of it, and in this case he is but as a private

man. This suit is a *Scire facias* to have Execution upon the said Recognizance. A *Dedimus potestatem* is directed to two, and one of them doth execute it; the other cannot certifie it for the Execution of it ought to be upon his own knowledge. A Record taken by one cannot be certified by another; for if it be, it is not any Record upon which a *Scire facias* can be awarded. In our Case, the Justices made the Record, and the Sheriffe did certifie it.

Let Chief Justice, When the Recognizance is put to writing, or Notes of Remembrance taken of the Recognizance before the Commissioners, it is immediately a Record. One takes Notes of a Recognizance, and dyeth. He to whose hands the Notes come may certifie the same, for it is a perfect Record by the taking of the Notes of Remembrance: But that is to be understood when no Writ is directed to Commissioners, but when a Justice takes it. In our Case the Sheriffe may return the Writ *ex officio*, and also return, That *executio istius brevis patet in quadam schedula annexa*. And it doth not appear but that the now Sheriffe was at the Execution of this Commission: But admit that he was not, yet now the Writ being returned into the Chancery, your pleading and taking issue upon another matter hath made it a good Record: And therefore I hold that the Judgment ought to be given for the King according to the Verdict. Haughton Justice, Judgment cannot be for King: If the Record doth not come duly into the Chancery according to course of Law, it is not any Record upon which there can be any Execution. If a Judge take a Fine and dyeth before it be certified, a *Certiorari* ought to be directed to the Executors of the Judge, *v. 2 H 7. 10.* but the *Certiorari* ought not to be to a stranger. If two Justices of Peace have Commission to take a Recognizance, and one of them taketh it and dyeth, the *Certiorari* must be to his Executors, and not to the other Justice. In this Case the Record came into the Chancery by undue course: The Commission was several, *Cuiuslibet eorum*; and those who took upon them the Execution thereof are now made Officers by the express words of the Writ; and it is not so here returned, and therefore Judgment ought to be against the King. A *Dedimus potestatem* is directed to four to take a Fine of Lands in several Counties: Two of them take it in one County, and they certifie it and the two other take it in another County, and they certifie it: None of the Certificates are good.

Dodderidge Justice, Judgment ought to be against the King. There are two Questions in the Case. 1. Whether the Sheriffe as this Case is, may onely make the Return. 2. Admitting that he cannot, but the same being returned, and the Chancery accepting of it, and sending it to this Court, whether we can damn the Record. 1. This is a special Recognizance upon the grievance of the party; and by the Kings commission they are made especial Judges in this case: And when the party
who

who sues, delivers the same to the two Justices, the Sheriff cannot intermeddle therewith; for then the Justices ought to return the Recognizance by virtue of that Commission. 21 H. 7. 20, 21. there the Case is direct in the point, That they to whom the Writ is first delivered, they only are to execute it, and return it; for they only have power by virtue of the special Commission. The Writ was against three, and two of them are not to be found. The Sheriff cannot return *Non sunt inventi*, for the two by force of this Commission: and he is not to make his Return as a Minister or Officer to the other, because the Writ is Judicial. If a Challenge be to the Sheriff and Coroners, and process is directed to *Essores*; they are to execute the process as particular Officers, by virtue of the Writ, and they are to return the same, and not the Sheriff, because their authority is by virtue of a special Writ. To the 2. point it hath been said, That the Record is in the Chancery, and the parties hath pleaded to it to issue, and it is now sent into this Court, and now fault is found with it but not before.

Though all this be so, yet we cannot accept of it here, if it have not due proceedings: If process be directed to the Coronors for Challenge to the Sheriff, and then a new Sheriff is made, against whom there is no cause of challenge, yet the Coronors must execute and finish the process, and not the new Sheriff: for the Law will not endure that Officers do make a mingling of their Offices. *Vi. 13 E. 4. & 10 E. 3. By Hill and Herle.* For Trials out of the Chancery: the Chancery and Kings Bench are but as one Court, and if the Record come not in due time as it should, the Court was never well seised of the Record. *Ley Chief Justice,* The coming of the Writ to the hands of one or two of the Commissioners, shall not stay the Commission, but the receipt of the one of them, is the receipt of them all having notice of it; and the others may joyn with him to whom the Commission is delivered: So it is in all cases, every one of the Commissioners are interested therein upon notice, and not he only to whom the Commission is delivered. If one Justice of peace taketh a Recognizance, and dieth before it be certified, the *Certiorari* shall be directed to the other Justice to certify it, if it come to his hands, and he may return the Recognizance, and it shall not be directed to the Executors of the Justice, who have not the Recognizance; for the *Certiorari* is but the hand for the Court to receive it, for otherwise the King might lose the benefit of the Recognizance: And in our Case the Sheriff by a special Commission hath Authority to take the Recognizance, and to return it upon Record. One may do part of the Office, as to make and take the Recognizance, and the other may return it; but one cannot execute a thing in part, and another in another part: the taking of the Recognizance by the two Justices, doth exclude the Sheriff from meddling with the taking or making of it, but it doth not hinder him but that he may return it well enough; and the

Writ or Commission is general, *Vicecomiti*, which may extend as well to the new Sheriff as to the old Sheriff. The Case was adjourned: for by two Judges, the *Supplicavit* and *Recognizance* were not well returned by the new Sheriff; but *Ley* Chief Justice was against them. *Quare*.

Trin. 21 Iacobi in the Kings Bench.

452.

RANDAL and HARVEY'S Case.

THE Case was, *Harvey*, in consideration that *Brown* might go at large, who was arrested at the suit of *Randal*, gave his word that *Brown* should pay the money at such a day certain; and for non-payment of the money, *Randal* brought his Action against *Harvey*, and being at issue upon the promise, it was found for the Plaintiff.

Telverton moved in arrest of Judgment, that the arrest of *Brown* was not warrantable by Law; and that being the consideration, the Promise was void: and he said, A man cannot make another his Attorney to arrest another man without Deed, neither can the Sheriff give Warrant to his Baylie to arrest another without a Deed sealed. And in the principal case, *Randal* gave one a VVarrant to *T.* being an Attorney, to demand, receive, and recover money from *Brown*; but it did not appear by the Declaration, that the VVarrant was by Deed in writing: *George Crook* said that it was no Exception; For, be the Arrest lawfull or unlawfull, yet he said the consideration was good.

Randal gave to his Attornie Authority to receive, demand, and recover, thereby he gave him Authority to arrest *Brown*, because the arrest is incident to the Recoverie. 2 R. 2. *Grants*, One grants to another, all the Fish in his Pond, he may fish with Nets: For when he giveth the principal, the incidents do follow. VVhen *Brown* had yielded himself to be lawfully arrested; and then *Harvey*, in consideration that *Brown* might go at liberty, made the promise, the same was good: The Declaration was, That *Randal* gave Authority to *T.* being an Attorney, to receive, deliver, and recover the Debt, by force of which Letter of Attorney *T.* did arrest *Brown*; and so in the Declaration it is shewed that the Warrant was a Letter of Attorney, *Telverton*, 34 H. 6. In Debt upon a Recoverie in the 5 Ports: If a man will declare and set forth a thing in particular, if he faileth in any thing, it overthroweth his Action; But if a man alledge generally a Recoverie in the 5 Ports, then the same is good enough. I agree the Case of 9 E. 4 Where a man

man gives leave to another to lay Pipes of Lead through his Lands, that he may dig the ground to lay them there, because it is incident to it. And I agree the Case of 2 R. 2. for there the one thing cannot be done without the other, *viz.* the Fish cannot be taken without Nets; but in this Case, the partie might have come by his money by *Outlawrie*, and so there needed no arresting of the partie.

Ley Chief Justice, If he had declared *debito modo arrestatus*, it had been generally good, and it must be intended that the Arrest was by vertue of a Letter of Attorney: For he alledges that he gave him Authority to recover; and then he shall have and use the means to recover, as to arrest the partie, or to *outlaw* him. *Haughton* Justice, Things incident and accessory may be comprehended in the principal, as to dig for to mend the Pipe 9 E. 4. Because he grants him leave to lay them in the ground; and so he may dig, and justifie the same for the amending of the pipes. If *A.* Licence *B.* to hunt in his Park, and to kill a Deer, yet *B.* cannot carry away the Deer, for that is not incident to the thing granted. In this case the Declaration is not good, for he ought to set forth that the VVarrant was by Deed in writing; and yet one may plead a Judgment generally, *quod debito modo* he recovered, and the same is good; but here in this case he ought to set forth and shew the VVarrant and Authority by which he was arrested; but not so in the case of pleading of a Judgment, because there it doth refer to matter of Record. *Dodderidge* Justice, The promise was to free him from the arrest, and if the arrest was unlawful, then there was no consideration, and so by consequent the promise was void: It ought to be shewed that *Brown* was lawfully arrest; and if the arrest had been only matter of inducement, and no cause of the Action, then it had been sufficient to have said *debito modo arrestatus*, but in this case the arrest it self is material; and the Plaintiff hath shewed that the arrest was (*per debitum legis Cursum*) by vertue of a VVarrant of Attorney, and it doth not appear but that it was a Letter of Attorney to deliver Seisin: and so because the Plaintiff hath not shewed the arrest to be lawfull, there was no good consideration whereupon to ground the promise, and so no cause of Action.

Telverton took another Exception, *viz.* That the Plaintiff doth not shew that the arrest was *per breve Regis*, or how it was. *Chamberlain* Justice, If the partie had brought an Action of false Imprisonment, this Plea had not been good, and in this case there appeareth to be no good consideration, for it doth not appear that it was a lawfull arrest, for no time is shewed, nor no place, nor how it was done. *Ley*, The Jury have found it to be *debito modo*, and in this case the arrest is not in question by matter of Plea, but by Declaration, and the finding of the Jury hath made the same to be good. *Dodderidge* Justice, If *A.* be indebted to *B.* *B.* may have either an Action upon the Case, or an Action of Debt.

Debt.

Debt for the money; but in an Action of Debt, unless it be in London by the Custome, *Concessit solvere* is no good Plea: But in an Action upon the Case, the Plaintiff may declare, That whereas A. was indebted to him in a certain sum of money, that *Concessit solvere*, and there he needeth not to shew how he became indebted unto him, as he ought to do in an Action of Debt.

Chamberlain Justice, If a man be arrested upon a void arrest, and another in consideration of setting him at liberty doth promise to pay the Debt, there it is a thing Collateral, and an Action will lie: But if the arrest cometh in question, then in that Case the Action will not lie, but he may avoid it by special pleading; for the arrest being unlawfull, there is no consideration whereupon to ground the promise. *Yelverton*, If the Plaintiff had said in the Declaration, That in consideration that he would forbear his Debt, that he would pay, &c. there for not payment, the Action would have been maintainable: but in this case, the consideration is the setting him at Liberty, and so it is Collateral. At another day, *Lev* Chief Justice, If I arrest a man generally, and the party promise for the discharge of the arrest, to give 20*l.* it is no good consideration, if I do not shew that he had cause to arrest him; For if the arrest be upon an ill ground, the consideration is not good. *Haughton* Justice, To make it a lawfull arrest, the partie ought to shew the Process, the Letter of Attorney, and the proceedings; and an agreement afterwards made, will not make the arrest good. *Legitimo & debito modo arrestatus* is too general, for he ought to shew how he became indebted to him: For if I be bounden to make unto I. S. a lawfull assurance or conveyance of such Lands, it is too general for me to say that I have made him a lawfull assurance; but I ought to shew what manner of assurance it is, that the Court may judge whether it be a lawfull and good assurance or not. In *Mich.* Term followinging 21 *Jacobi*, It was adjudged, That Judgment should be arrested.

Trin. 21 *Jacobi*, in the Kings Bench.

Intratur, *Mich.* 19. *Rot.* 52.

IN an Action upon the Case upon an Assumpsit, the Declaration was general, that the Defendant Assumpsit to the Plaintiff; and the Jury found

found that the promise was made to *I. N.* who *Seignior* the Plaintiff sent and appointed *ad componendum & agreandum* the Debt of *Wolmer* the Defendant. It was argued, That the promise made to the Servant, was a promise to the Master. *Vi. 2 E. 4.* Where the sale of the Servant is the sale of the Master. *8 H. 5. in trespass*, The Defendant said that the Prior of &c. was seised, &c. and that such a one his Steward made a Demise unto him; there it was ruled that he ought to have pleaded that the Prior did demise. *V. 27 H. 8. Jorden and Tatams Case*, which is express in the point: *Jorden* brought an Action upon the Case against *Tatam*, and declared that he did assume to him (as the words of the book are.) The Evidence was, That *Tatam* came in the absence of *Jorden* the husband, and assumed to the wife of *Jorden*, (and our Case is a stronger Case then that, for there the husband gave no authority to the wife to take such Assumpsit; but in our Case he did authorize *I. N.*) and it was adjudged that the agreement of the husband afterwards, made the Assumpsit to be good to the husband: But in our Case, *I. N.* had authority to take the Assumpsit, viz. *Seignior* sent *I. N. ad componendum & agreandum* the Debt: and *Wolmer* assumed to pay the money, &c. and *I. N.* gave notice thereof to *Seignior*, and he agreed unto.

Dodderidge Justice, An Assumpsit to the Servant for the Master, is good to the Master: and an Assumpsit by the appointment of the Master of the Servant, shall bind the Master, and is his Assumpsit. *27 Ass.* If my Bailly of my Mannor buy cattel to stock my grounds, I shall be chargeable in an Action of Debt; and if my Bailly sell corn or cattel, I shall have an Action of Debt for the money; For whatsoever comes within the compass of the servants service, I shall be chargeable with, and likewise shall have advantage of the same. If a Servant sellerh a horse with Warranty, it is the sale and contract of the Master, but it is the Warranty of the Servant, unless the Master giveth him authority to warrant it, for a Warranty is void which is not made and annexed to the contract; but there it is the Warranty of the Servant, and the Contract of the Master: But if the Master do agree unto it after, it shall be said that he did agree to it *ab initio*. As where a Servant doth a disseisin to the use of his Master, the Master not knowing of it, and then the Servant makes a Lease for years, and then the Master agrees, the Master shall not avoid the Lease for years; for now he is in by reason of his agreement *ab initio*. When the Servant promisseth for the Master, that the Master shall forbear to sue, &c. and shall by such a day deliver to the Defendant the Obligation, &c. and the Defendant promisseth to pay the money at such a day; and the Master having notice thereof agreeth to it, it is now the promise of the Master *ab initio*, for it is included in his authority that he should agree, compound, &c. and he hath power to make a promise. Judgment in the principal Case was given for the Plaintiff.

*Trin. 21 Jacobi, in the Kings Bench.
Intratur, Pasch. 18. Rot. 139.*

454. GLEEDE and WALLIS Case.

A Writ of Error was brought to Reverse a Judgment given in the Court of *Northampton* in an Action upon the Case, upon a Promise: The Error which was assigned was, because that it appeareth that the Action was brought before the Plaintiff had made request. The Case was, a Contract was made betwixt *Gleede* and *Wallis*, and *Wallis* was to pay to *Gleede* 10*l.* when *Gleede* should require him. *Gleede* brought an Action in the said Court 1 *Martii*, 16 *Jacobi*; and the Request is laid to be 7 *Martii* 16 *Jacobi* following. Where a Contract is made, and no time is expressed for payment of the money, If the partie bring his Action before he make his request, he shall not have damages; but if he maketh an actual request, and the Defendant doth not pay the money, there he shall recover damages besides the dutie: Here the Action was brought before the request made, and so no damage to the Plaintiff; and the Judgment was, that the Plaintiff *recuperet damna predicta*, viz. the damages laid in the Declaration. *Dodderidge* Justice, The Judgment ought to be *Consideratum est quod Gleede recuperet damna qua sustinuit*, and not *damna predicta*, which are mentioned in the Declaration, and then a Writ is awarded to enquire of the damages *qua sustinuit*. The Judgment was reversed per *Curiam*.

*Mich. 1 Caroli, in the Kings Bench.
Rot. 189.*

455. TAYLOR and HODSKIN's Case.

IN an *Ejectione firme* upon a special Verdict it was found, That one *Moyle* was seised of divers Lands in Fee, holden in *Socage*; and having issue four daughters, viz. *A, B, C, & D.* *A.* had issue *N.* and died: And afterwards *Moyle* devised the said Lands unto his wife for life; and after her decease, then the same equally to be divided amongst his daughters

ters or their heirs : *Moyle* died, and afterwards his wife died ; and *Hodskins* in the right of *B, C, & D.* three of the daughters, did enter upon the Lands ; *N.* the daughter of *A.* married *F.* who entered and leased the Lands to the Plaintiff *Taylor.* *Whitfield* for the Plaintiff, The only point is, Whether *N.* the daughter of *A.* one of the sisters shall have the fourth part of the lands or not, by reason of the word (*Or*) in the Will.

It is apparent in our books, *C. 10. part 76.* the Chancellor of *Oxford* Case. *C. 3. part, Butler and Bakers* Case, That Wills shall be construed and taken to be according to the intent of the Devisor : And therefore *Br. Devise 39.* A devise to one to sell, to give, or do with at his will and pleasure, is a Fee-simple. And in our Case if *N.* shall not take a fourth part, the word (heirs) should be of no effect. *C. 1. part in Shellies* Case, All the words in a Deed shall take effect, without rejecting any of them ; and if it be so in a Deed, *a fortiori* in a Will, which is most commonly made by a sick man who hath not Council with him to inform or direct him. In this Case the three sisters who were living at the time of the Devise, took presently by way of remainder ; and the word (heirs) was added only to shew the intent of the Devisor, That if any of the three sisters had died before his wife, that then her heir should take by descent, because her mother had taken by purchase. And by reason of the word (heirs) the heir of *A.* shall take by purchase ; and the disjunctive word (*or*) shall be taken for (*and*) as in *Mallories* Case, *C. 5. part.* A reservation of a Rent to an Abbot or his Successors ; there the word (*or*) shall be taken for (*and*) *reddendo singula singulis. Trin. 7. Jacobi,* in the Common Pleas, *Arnold* was bound in a Bond upon Condition, that he suffer his wife to devise Lands of the value of 400*l.* to her son or her daughter ; and she devised the Lands to her son and her daughter : And it was resolved that it was a good performance of the Condition. And there the word (*or*) was taken for (*and*) : And there Justice *Warburton* put this Case, If I do devise all my goods in *Dale* or *Sale*, it shall be a Devise of all my goods in both places ; and (*or*) shall be taken for (*and*.) In this Case the word (heirs) was not added of necessity for the heir of any of the sisters to take by purchase ; but only to make the heir of *A.* to take part of the Lands. The Court was of opinion that it was stronger for the Plaintiff to have it (*or*) in the disjunctive ; For they said that if it were (*and*) then it would give the three sisters the Fee, and not give the heir of *A.* a fourth part ; but being (*or*) there is more colour that she shall take a fourth part by force of the Devise. It was adjourned.

Trin: 2 Caroli, Rot. 913. in the Kings Bench.

456. ASHFIELD and ASHFIELD's Case.

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THe Case was, An Infant Copyholder made a Lease for years by word, not warranted by the Custome rendering Rent; The Infant at his full age was admitted to the Copyhold, and afterwards accepted of the Rent: The question was, Whether this Lease, and the acceptance of the Rent should bind, or conclude the Infant. *Crawley* Serjeant argued, That it was a void Lease, and that the acceptance should not bar him. It is a ground in Law, That an Infant can do no Act by bare contract by word, or by writing can do any Act which is a wrong either to himself or unto another person, or to his prejudice. In this Case, if the Lease should be effectual, it were a wrong unto a stranger, viz. the Lord, and a prejudice unto himself, to make a forfeiture of the Inheritance. If an Infant commandeth *A.* to enter into the land of *I. S.* and afterwards the Infant entreath upon *A.* *A.* is the Disseisor and Tenant, and the Infant gaineth nothing. So if *A.* entreath to the use of the Infant, and the Infant afterwards agreeth to it, in this Case here is but a bare contract; and an agreement will not make an Infant a Disseisor: No more shall he be bound by a bare Deed, or matter in writing without Livery. 26 *H.* 8. 2. An Infant granteth an Advowson, and at full age confirmeth it, all is void. *Br. Releases* 49. Two Joynt-Tenants, one being an Infant releaseth to his Companion, it is a void Release, 18 *E.* 4. 2. An Infant makes a Lease without reserving Rent, or makes a Deed of grant of goods, yet he shall maintain Trespass; nay though he deliver the goods, or Lease with his own hand, the same will not excuse the Trespass, nor will it perfect the Lease, or make the grant of the goods good. If the Contract have but a mixture of prejudice to the Infant, it shall be void. § *Jacobi* in the Kings Bench, *Bendloes* and *Hollidaies* Case. An Obligation made by an Infant with a Condition to pay so much for his apparel; because the Bond was with a penaltie, it was adjudged void. If Tenant at Will make a Lease for years, he was a Disseisor at the Common Law, before the Statute of *West.* 2. cap. 25. 12 *E.* 4. 12. Tenant at Will makes a Lease for years. 10 *E.* 4. 18. 3. *E.* 4. 17. But if an Infant be Tenant at will, and he maketh a Lease, he is no Disseisor. In our Case, if he had made Livery, then I confess it had been a defeasible forfeiture, and he might have been remitted by his entrie upon the Lord. *Farrer* for the Plaintiff, The Lease is not void, but

but voidable. 7 E.4. 6. *Brian*, 18 E.4. 3. 9 H.6.5. An Infant makes a Lease for years, and at full age accepts of the Rent, the Lease is good, because the Law saith that he hath a recompence. *Com.* 54. A Lease for years, the remainder for years rendring Rent by an Infant, and afterwards at his full age he accepts the Rent of the particular Tenant, it is a good confirmation of the estate of him in the remainder. *Litt.* 547. If he at full age confirm, it is good; which could not be if the Lease were void: and yet in that Case it doth not appear that there was any Rent reserved: The Infant being a Copyholder makes no difference in the Case. And in *Murrells Case*, C. 4. part, It is said, That if a Copyholder make a Lease not warrantable by the Custome, it is a forfeiture, which proves it is a good Lease, otherwise it could not be a forfeiture. *Hill.* 37 *Eliz.* in the Kings Bench, *Rot.* 99. *East and Hardings Case*. A Copyholder makes a Lease for three years by word, to begin at *Michaelmas* next ensuing; it is a forfeiture of the Copyhold, and a good lease betwixt the parties.

Hill. 18 *Jacobi*, *Haddon and Arrowsmiths Case* One licensed his Copyholder for life, to make a Lease for 20. if he should so long live; and he made a lease for 40 years, and left out the words (if he should so long live) yet because he was a Copyholder for life, and so the lease did determine by his death, and so he did no more then by Law he might do, it was adjudged a good Lease, and no forfeiture; otherwise if he had been a Copyholder in Fee. All Conditions in Fact shall bind an Infant, but not Conditions in Law. C. 8. part 44. *Whittinghams Case*, An Infant, Tenant for life or years, makes a Feoffment in Fee, it is no forfeiture; For if the Lessor entreat, the Infant may enter upon him again; yet it is a good Feoffment, but he shall avoid it by Infancy; but if it be by matter of Record, then it is otherwise: For if an Infant be Lessee for life, and levieth a Fine, it is a forfeiture; and in that case if the Lessor enter for the forfeiture, the Infant shall not enter again. The same Law if an Infant committeth Waste which is against a Statute, it is a forfeiture; and if the Lessor recovereth the place wasted, the Infant shall not enter again. 9 H. 7. 24. A woman an Infant, who hath right to enter into lands, taketh a husband, and a discent is cast, yet she shall avoid the discent after the death of her husband.

The Court said, That if in the Case at Barr the Infant had been Tenant in Fee at the Common Law, and made a lease without Deed, and had accepted the Rent at his full age, that the same had been good, for that there he had a recompence; but being a Copyholder it is a question. *Jones Justice*, It was adjudged in the Common Pleas in *Peters Case*, That if a Copyholder without licence maketh a Lease not warranted by the Custome, That such Lessee should maintain an *Ejectione firme*. The Counsel against the Infant in the Case at Barr said, That the

366 George Busher against Murray, &c.

the Enfant made the Lease as Tenant by the Common-Law, for that he made it by Conveyance of the Common-Law: And so the Lease was voidable, and not void; and then the acceptance of the Rent had made the Lease to be good. It was adjourned to another day.

Hill. 2. Caroli, Rot. 389 in the Kings Bench.

457. GEORGE BUSER against MURRAY

Earl TILLIBARN.

A *Scire facias* was brought dated 28 Junii returnable in Mich. Term 2 Car. Regis, why Execution should not be awarded against the Defendant upon a Judgment had against him in this Court. The Defendant pleaded, That King Charles, 7 Octob. in the second year of his Reign, did take him into his protection for a year, and did grant unto him that during that time he should be free from all manner of Plaints but *Dower, Quare Impedit*, and *Placit. coram Justiciariis Itinerantibus*. It was said that this Protection was not warrantable by Law for three causes. 1. Because it is after the purchase of the *Scire facias*, and before the Return. 10 H. 6. 3. 11 H. 4. 7. A Protection depending the Suit is not allowable, although it make mention that the party is to go a voyage with the Kings Son. 2. Because he doth not specify any particular cause why the Protection was granted unto him. All our books do express a cause, viz. *Quia moratur &c. quia profecturus &c.* Register 22, 23. there three Protections are *Quia incarceratus*. 39 H. 6. 38, 39, 40. per Curiam. The Protection ought to express a special cause, otherwise it is not good. Fitz. 28. a. b. the cause is expressed. 12 R. 2. cap. 16. The particular cause ought to be in the Protection. A Protection being general, the party hath no remedy against him to traverse it, or to procure it to be repealed. 3. This Court is greater then a Justice in Eyre, and he is excepted in *placitis itinerantibus*. That Court was of opinion that there was no colour for allowing of the Protection. A Safe-conduct will only keep the party safe from harm, but will not protect him from Actions.

Mich.

Mich. 2 Caroli, Intratur Pasch. 18. Jar.
Rot. 298. in the Common Pleas.

458. ROYDEN and MOULSTER's Case.

IN Trespass for entering into his Close called *Dipson* in *Suffolk*, upon Not guilty pleaded, the Jury gave a special verdict, That the said Close was parcel of the Mannor of *Movedon*, and demisable by Copy of Court-Roll; and that the same was granted to *G. Starling* in Fee by Copy of Court-Roll, who had issue two sons, *John* and *Henry*: And that 35 *Eliz.* *George Starling* did surrender the same to the use of his Will, and thereby demised the same to *John* and the heirs males of his body, with divers Remainders over, and dyed seised: And that the Surrender was presented according to the Custom; and that *John* was admitted to have to him & his heirs; And that the said *John* had issue 3 sons, *Harry*, *George* and *Nicholas*; And that the said *John* 43 *Eliz.* did surrender to the use of his Will, and thereby devised the same to *Katherine* his wife and dyed, and that the said Surrender 9 *Martii* 45 *Eliz.* was presented, and the said *Katherine* was admitted: *Harry*, *George* and *Nicholas* dyed without issue. They further found, That the Custom of the Mannor is, That the youngest brother is to have the Copyhold by descent. And also That no Copyholder by the Custome could make any Estate in feodo, and that the said *Katherine* took to her husband *Francis Robinson*, who 1 *Sept.* 17 *Iacobi* leased the same to *Royden* the Plaintiff for one year, who entred and was thereof possessed, untill *Moulster* the Defendant by the commandment of &c. did ouster him &c. In which case, the only Question was, Whether a Copyhold be within the Statute of *West.* 2. so as an estate thereof so limited should be a Fee tail, or a Fee conditional. And by the opinion of the Justices of the Common-Pleas it was adjudged, That a Copyhold could not be entituled within the Statute of *West.* 2.

First they said, That Copyholds are not within the letter of the Statute, which speaks onely *de tenementis per chartam datis*, &c. Secondly, they are not within the meaning of it: 1. Because they were not untill 7 *E.* 4. 19. of any accompt in Law, because they were but Estates at will. 2. The Statute of *West.* 2. provides against those who might make a *dissein* herefin by Fine or Feoffment, which Copyholders could not do. 3. Because if Copyholders might give lands in tail by the Statute, then the Reversion should be left in themselves, which cannot be.

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4. The Makers of the Statute did not intend any thing to be within the Statute of *Donis* whereof a Fine could not be levied; For the Statute provides, *Quod finis ipso jure sit nullus*. 5. Great mischiefs would follow, if Copyholds should be within the Statute of *West. 1.* because there is no means to dock the estate, and no customary conveyance can extend to a Copyhold created at this day. 37 *Eliz. Lane and Hills* case adjudged in the Common-Pleas was cited by Justice *Harvey*, where a Surrender was unto the use of one in tail, with divers remainders over in tail: The first Surrenderee dyed without issue; And first it was agreed and adjudged, That it was no discontinuance. 2. If it were a discontinuance, yet a *Formedon* in the Remainder did not lie, because there ought to be a Custom to warrant the Remainder as well as the first Estate tail: For when a Copyholder in Fee maketh such a gift, no Reversion is left in him, but only a possibility; And the Lord ought to avow upon the Donee, and not upon the Donor. And there is a difference when he maketh or giveth an estate of inheritance, and when he maketh a Lease for life or years; for in the one case he hath a Reversion, in the other not. 2. A Recovery shall not be without a special custom, as it was agreed in the Case of the Mannor of *Stophney*, because the Warrantie cannot be knit to such an Estate without a Custom. And for expresse authority in the principal Case he cited *Piss and Horkley's Case*, which was *Ter. Pasce. 35 Eliz. rot. 334.* in the Common-Pleas; where it was resolved, That Copyholds were not within the Statute of *Donis* for the weakness and meanness of their estates: For if they were within the Statute of *West. 2.* the Lord could not enter for Felony, but the Donor; and the Services should be done to the Donor, and not to the Lord of the Mannor. And so, and for these mischiefs he conceived, That neither the meaning nor the words of the said Statute did extend to Copyholds. *Hill. 34 Eliz. Rot. 292.* in the Kings Bench, *Stanton and Barney's Case*. A Surrender was made of a Copyhold within the Mannor of *Stiversden* unto one and the heirs of his body; and after issue he surrendered unto another: And it was agreed by all the Justices, That the issue was barred. And *Popham* did not deny that Case; but that it was a Fee conditional at the Common-Law, and that *post prolem suscitatum* he might alien. And so it was agreed in *Decrew and Higden's case, Trin. 36. Eliz. rot. 547.* in the Kings Bench; and in *Erish and Ives* case 41 & 42 *Eliz.* in the Common-Pleas, in an Evidence for the Mannor of *Isleworth* That no Estate tail might be of a Copyhold without a Custom to warrant it. *Mich. 36 & 37 Eliz.* in the Kings Bench it was adjudged, That a Copyholder could not suffer a common Recovery; and the reason was, because that the Recovery in value is by reason of the Warrantie annexed to the Estate at the Common-Law, which could not be annexed to a Customary estate: And another reason was given, because that he who recovers in value, shall be in by the Recovery, and the

the Copy of the Court-Roll only should not be his Evidence, as *Littleton* and other books say it ought to be. And *Crook* said, That the Statute of *Donis* was made in restraint of the Common-Law. And it should be very disadvantageous to the Lord, if Copyhold should be construed to be within that Statute. And therefore he conceived that the said Statute did not extend to Copyholds by any equitable construction.

And such difference was taken by *Popham* Chief Justice, 42 *Eliz.* in the Kings Bench, rot. 299. in *Baspool* and *Long's* Case: For he said, That a Custom which did conduce to maintain Copyholds, did extend to them; But a Statute or a Custom which did deprave or destroy them, did not. As if one surrender to the use of one for life, the Remainder in Fee, where the Custom is to surrender in Fee, the Custom doth not extend thereunto, because a Custom which goes in destruction of a Copyhold shall be taken strictly. But if a man be Copyholder in Fee, he may grant a Fee conditional.

Harvey Justice put some Cases to prove the small account the Law had of Copyholds at the time of the making of that Statute, as 40 *E.3.* 28. 32 *H.6.* *br. Copyhold* 24. And he said, That there is not any book in the Law but only *Mancels* case in *Plow. Comm.* That the Statute of *West.* 2. doth extend to Copyholds.

Hill. 2 Caroli, rot. 235 in the Kings Bench.

459. LITFIELD and his Wife against MELHERSE.

A Writ of Error was brought upon a Judgment given in an Action upon the Case brought by Husband and Wife in the Common-Pleas for words spoken of the Plaintiffs wife: And the Judgment in the Common-Pleas was, That the husband and wife should recover. And that was assigned for Error in this Court, because the Husband only is to have the damages; and the Judgment ought to be, That the Husband alone should recover. But notwithstanding this Error assigned, the Judgment was affirmed by the opinion of the whole Court.

Pascb. 2 Caroli, rot. 362. in the Kings Bench.

460 HOLMES and WINGREEVE'S Case.

A Writ of Error was brought to reverse a Judgment given in the Court at *Lincoln*, in an Action of Trespass there brought for taking away a Box with Writings. And four Errors were assigned.

1. Because the Plaintiff did not appear by Attorney or in person at the return of the Attachment against the Defendant; so as there was a discontinuance, for the Plaintiff ought to appear *de die in diem*.
2. Because in his Declaration there he saith, That the Defendant took a Box with Writings, and doth not make any title to the Box, nor shews that the same was lockt, nailed, or sealed. 2 *H. 7. 6. a.* The certainty of the writings ought to be shewed, that a certain issue may be taken thereupon. *Com. 85. 22 H. 6. 16. 14 H. 6. 4. 21 E. 3.* He ought to shew the certainty of the writings. 18 *H. 1. Charters in a Box sealed. C. 9. part. Bedingfields case. C. 5. part. Players case;* The Declaration was insufficient, because the Plaintiff therein did not name the certain number of the Fishes.
3. He pleaded, That he made a Bill Obligatory, and doth not shew that it was delivered. *Dyer 156. Per scriptum suum gerens datum*, and doth not say *Primo deliberatum*, is not good. The fourth Error was, That in the Replication the Plaintiff saith (*dixit*) whereas it ought to be *dicat* in present tense. 10 *H. 7. 12.* The title to the Assise took Exception to the Plaintiffs title, because that he said (*fuit seitus*) of a Messuage, whereas he ought to have said (*est seitus*) But yet it was there holden good, because he saith, that all those whose title he hath, &c. by which words the possession shall be intended to continue. 35 *H. 6. 11. 85. vi. 63.* A Writ a False Judgment directed to the Sheriffe, *Recordare loquelam (que est)* and the form, and the presidents are (*que fuit*). 9 *H. 6. 12.* The Sheriff returns *Non est (inveni)* whereas it ought to be (*Non est inventus*) and adjudged Error. And he said, That *Detinue* is only to be brought when it self is to be recovered in as good plight, and no other Action. It doth appear by the Record, that in this Case at Trial 18 were only returned upon the Pannel, whereas there ought to have been 24 returned. By the Statute of *West. 2. cap. 38.* 24 ought to be returned on the Pannel. 8 *H. 4. 20.* More then 24. shall not be returned. 2 *H. 7. 8.* The Sheriffe returned but 12. and it was ruled to be an insufficient return, because 24 ought to have been returned. 36 *H. 6. 27.* Trespass is brought for a Box

Sir William Fish and Wiseman's Case. 371

Box and Charters which concerned the Plaintiffs lands, and damages were given entirely; and there it was adjudged not to be good, because the Plaintiffs did not make any title to the Box, nor did shew that the same was locked or sealed: For the Box may belong to one, and the Charters to another, as the Evidences to the heir, and the Box to the Executors, unless the Box be first locked.

Note, The opinion of the whole Court was, because that the issue was particular, That he was not guilty of the Trespass and detaining untill the Plaintiff had entred into a Bond. And the Jury found him guilty of the Trespass generally, That the Verdict was not good to make the Defendant guilty by implication. And Justice Dodderidge said, That the Plaintiff hath brought his Action of Trespass, and doth not lay any possession of the Box; And Trespass is a possessory Action. Also he said, That the Plaintiff did not set forth the Quality of the Evidences, viz. Whether they were Releases, Deeds of Feoffments, or other particular Evidences. And for these causes, and for the causes before alledged, the Judgment given in the Court at Lincoln was reversed.

Pasch. 3 Caroli, in the Kings Bench.

461. Sir WILLIAM FISH and WISEMAN'S Case.

Judgment was given in the Common-Pleas against Sir William Fish; and after the year and day Execution was awarded by *Capias*, where it ought to have been by a *Scire facias* first: And the Plaintiff was taken in Execution, and brought a Writ of Error in this Court, where the Judgment was affirmed; but the Execution was reversed, because the Execution was not warrantable, the Process being erroneous. And out of the Kings Bench another Execution was awarded by *Capias sicut alias*, within the year of the affirmance of the Judgment in the Kings Bench. And it was moved by *Banks*, That the Execution was erroneous, because he ought to have a *Scire facias*, because the year is past after the Judgment in the Common-Pleas; and although that the Court be changed, yet the Plaintiffs ought to have the same Process for Execution as he ought to have in the first Court. 14 H. 7. 15. The first Process was reversed for Error; and then he cannot have a *Sicut alias*, but ought to have a new Original. We pray a *Superedeas* of the Execution for Sir William Fish the Plaintiff, and that he may be delivered out of Execution. Sir William Fish had a Release, and that was the cause that Wiseman would not take a *Scire facias*. Sir William Fish upon the Judgment in the Common-Pleas was taken in Execution; and upon a Writ

of Error brought, Bail was put in to proceed with effect; and then he was delivered out of Execution; And then he cannot now be taken in Execution again upon the same Judgment. 16 H. 7. 2. *per Curiam*, If one be in Execution upon Condemnation in the Common-Pleas, and the Record and the body is removed into the Kings Bench by Error; then the party shall find collateral Securities by their Recognisance to pay the Condemnation in case the Judgment be affirmed, and further to proceed with effect. In this case the body is discharged of Execution as to any Process to take the body; unless he render himself to prison of his own accord to discharge his Sureties: And if he will not do it, he who recovereth hath no remedy but to make the Sureties to pay the Condemnation by reason of their Recognisance. 2 E. 4. 8. A man is condemned in *London tempore Vacationis*, and hath Execution in the Term; and the Defendant sueth a *Corpus cum causa*, and had his privilege in the Common-Pleas.

Danby, The Plaintiffe shall not have Debt, for at the beginning when the Defendant was in Execution, the Action of Debt was gone; and then he being discharged, here the Action of Debt doth not lie. To which *Needham* agreed. And *Choke* said, He did not know any remedy that the party had, and conceived that he could not have a new Execution. 14 H. 7. 1. If one escape out of Execution, the Plaintiffe cannot take him again in Execution, but his remedy is against the Gaoler. The Court may *superfedeat* this Execution, because it is erroneous; 34 H. 6. 45. b. An Action of Debt was brought against an Executor, who pleaded that he had fully administred; And it was found that he had Asssets, and Judgment was given against the Defendant, and a *Capias* was awarded against him, and after that an *Exigent*: And the Court granted a *Superfedeas*, to supersede that Erronious process; For a *Capias* doth not lie against an Executor where he pleads, &c. but a *Fieri facias*. And therefore in the principal Case *Banks* prayed a *Superfedeas*.

○ *Jones* Justice, If Error be brought within the year of the Judgment in the Common-Pleas, and the Judgment be affirmed here, the party shall have a *Capias* although the Judgment be affirmed two years after the bringing of the Writ of Error: For he shall take the same Execution in the Kings Bench, as in the Common-Pleas; and the altering of the Court makes no difference in it. And so was *Garmon's* case: The Writ of Error was brought within the year of the Judgment in the Common-Pleas, but it was not affirmed in two years after, and yet there he had the same Process in the Kings-Bench as he was to have had in the Common-Pleas. *Dodderidge* Justice. If the Execution be lawfull and upon lawfull Process, and the party be delivered out of Execution, then he shall not be taken again in Execution: But if he be taken in Execution upon an erroneous Process, if he be delivered out, he may be taken again in Execution; for the first Execution was erroneous, and is no Record being reversed.

Hyde Chief Justice, If a man recover in Debt upon an Obligation, and the Judgment be reversed by Error, he is restored to his first Action, and may plead *Nul tiel record*. *Dyer* 59, 60. *Trivingsards Case*, A man in Execution had a VVrit of Priviledg out of the Parliament; upon which the Sheriff sets him at liberty by Law for a time, yet he shall be in Execution again, and the Law saves the others right. *Broome* Secondary of the Kings Bench, If Error be brought after the year of the Judgment in the Common Pleas, and the Judgment be affirmed here, the partie may take forth a *Capias* within the year of the Judgment affirmed; although in the Common Pleas he cannot have a *Capias*, because the year is past: For we are not to respect what process he ought to have in the Common Pleas; but after the year of the Judgment affirmed here, the partie is to have a *Scire facias*. *Jones* Justice said, That when he was a Reporter, the Judges delivered their opinions in *Garnons Case*, C. 5. part 88. That if after the year and day he bring Error, and the Judgment be affirmed, that he ought to have the like process here as in the Common Pleas: And that was a *Scire facias*, because that the year was past in the Common Pleas, although it were within the year of the Judgement affirmed here. *Dodderidge* Justice, The Cases which *Banks* cited are Law, but are not well applied. The whole Court was of opinion, That if the Common Pleas award erroneous process, the Court cannot award a *Superfedeas*; but the partie is put to his VVrit of Error here: and upon that erroneous Process we cannot grant a *Superfedeas*, but the partie is put to his new VVrit of Error. And according to the opinion of the Court, Sir *William Fish* brought a new VVrit of Error.

Mich. 2 Caroli, Rot. 179. in the Kings Bench.

462.

BELLAMY and BALTHORP'S Case.

IN an Action of *Trover* and *Conversion*, The Plaintiff did lay it, that he was possessed of twenty Loads of Wheat, and that he lost them; and that they came to the Defendants hands, who converted the same to his own use. The Defendant did justify and said, That the Parish of *O.* is an ancient Parish, in which there is a Rectorie impropriate, &c. and the Earl of *Clare* was seised of the Rectorie, and made a Lease unto him of the Tythes of that Parish for one year, by force of which he was possessed; and that the Corn was set forth by the Parishoners, and that one *T.* gathered the Tythe, and delivered the same to the Plaintiff, and that the Defendant his Servant took away the Tythe as it was lawful for

for him to do : Upon which the Plaintiff did demurr ; First because the Plea did amount to no more then the general issue, *viz.* Not guilty : and if the Plea do amount to no more then the general issue, then it is no good plea ; but he ought to have taken the general issue. *H. 7. 11. Aff.* For if in an Assise the Tenant saith that the Plaintiff did disseise him, and that he entred upon him, the plea is not good, because it amounts but to the general issue, *viz.* *Nul tort nul disseisin*, and the other party may demurr upon it. *22 E. 4. 40.* In Trespass for Batterie, it is no plea to say that he did not beat him, because it is but Not guilty by Argument. *34 H. 6. 28. b.* If I bring Trespass for breaking of my Close, It is no good plea to say that I have no Close ; or if it be for carrying away my Goods, to say that I had not any Goods ; but the Party ought to have pleaded Not guilty.

It may be objected, That in this Case the Defendant makes Title to the Corn. To that we say, He derives a Title to Tythes without a Deed, which gives no title to them ; For Tythes do not pass by Demise alone without Deed ; but by the demise of the Rectorie without Deed they will pass : So by a Feoffment of a Mannor without Deed the Services will pass ; but the Services alone will not pass without a Deed. *21 H. 7. 21. 19 H. 8. 12.* A Warren may be demised without Deed. *9 E. 4. 47.* But the profits of Courts will not pass without Deed. *22 H. 6. 34. b.* By way of Contract a Demise may be of Tythes without Deed, but in pleading it ought to be set forth that there was a Deed : *C. 10. part 92.* Where the Deed ought to be shewed ; which proves that there ought to be a Deed. In the Common-pleas in an Action of Trover and Conversion of certain Goods, the Defendant said, That *A.* was possessed of them, and made him Executor, &c. And the Plaintiff did demurre, and had Judgment, because it amounted but to the generall Issue. *Dodderidge* Justice ; The Parson may demise his Tythe to the Owner of the Land without Deed ; but he cannot grant them to a stranger without Deed. If the Defendant make Title from a stranger, then it doth amount to the generall Issue ; but if both Plaintiff and Defendant make Title from one Person or Donor, then the plea is a good plea. Otherwise, *per Curiam*, it doth amount to the generall Issue. But the Opinion of the Court was, because that the Defendant did make a title of Tythes without a Deed ; therefore Judgment in the principall Case was given for the Plaintiff.

Trin. 3 Caroli, in the Kings Bench.

436. The Dean and Chapter of Carlisle's Case.

A Writ of Error was directed unto the City of *Carlisle*, to remove the Record of a Judgment given there in *Curia nostra*, whereas the Judgment was given *tempore Jacobi*: And the Opinion of the Court was, That it was not good, nor the Record thereby well removed. *Dyer 4. Eliz: 206 b.* There was a *Certiorari* to remove a Record *cujusdam inquisitionis capte. &c. in Curia nostra*: Whereas in truth it was taken in the time of the predecessor of the King, and so thereby the Record was not well removed. *Dodderidge* Justice, If a Writ of Error doth abate upon the Plea to the Writ, and the Record be well removed, the partie may have a new Writ of Error, *coram vobis residet, &c.* but if the Record be not well removed, as in this Case at Barr it is not, then the partie shall not have a new Writ of Error here. We do many times grant a *Scire facias* to sue forth Execution in the inferior Court, which proves that the Record by an ill and insufficient Writ of Error is not removed, but doth remain there still. If there be variance betwixt the Record and the VVrit of Error, the Record is not well removed; but if the VVrit of Error want only form, but is sufficient for the matter in substance, the VVrit shall not abate, but the partie may have a new VVrit of Error *coram vobis residet, &c.*

Trin. 3 Caroli, in the Kings Bench.

464.

MILL'S Case.

A Ction upon the Case for these words, *Thou hast Coyned Gold, and art a Coyner of Gold*; Adjudged the Action will not lie. for it may be he had Authority to Coyn; and words shall be taken in *missiori sensu*:

Pasch.

Pasch. 3 Car. in the Kings Bench.

465.

BROOKER'S CASE.

THE question was, VWhether the Feoffee of the Land might maintain a VVrit of Error to reverse an Attaindor by *Utgary*; and the Case was this, *William Isley* seised in Fee of the Mannor of *Sundridge* in Kent, had issue *Henry Isley*, who was Indicted of Felony 18 *Eliz.* and 19 *Eliz.* the Record of the Indictment was brought into this Court; and thereupon 20 *Eliz.* *Henry Isley* was outlawed, *William Isley* died seised, *Henry Isley* entred into the Mannor and Land as son and heir, and being seised of the same, devised the Mannor and Lands to *C.* in Fee, who conveyed the same to *Brooker*, and *Brooker* brought a Writ of Error to reverse the Outlawry against *Henry Isley*. *Holborn* argued for the King, and said that *Brooker* was no way privy to the attaindor of *Henry Isley*, but a meer stranger, and therefore could not maintain a Writ of Error; And first he said, and took exception, that he had not set himself down *Terre-Tenant* in possession. Secondly, he saith in his Writ of Error, That the Mannor and Lands descended to *Henry Isley* as son and heir, when as he was attainted. The third exception was, That he saith that *Henry Isley* did devise the Lands, and that he could not do because he was a person Attainted. Fourthly, he said that *Brooker* was not Tenant so much as in *posse* 4 H. 7. 11. If it were not for the words of Restitution, the partie could not have the mean profits after the Judgment reversed. 16 *Aff.* 16. Lessee for years pleaded to a *Precipe*, and reversed it; the question was, whether he should be in *statu quo?* *vi. Librum*, for it is obscure. If this Attaindor of *Henry Isley* were reversed, yet it cannot make the devise good; For there is a difference betwixt Relations by Parliament which nullifie Acts, and other Relations. *Vi.* 3 H. 7. *Sentlegers Case*, *Petition* 18. The violent Relation of Acts of Parliament. If a Bargain and Sale be, the Inrollment after will make Acts before good; but a Relation by Common Law, will not make an Act good, which was before void. *C.* 3. *part.* *Butler and Bakers Case*, A gift is made to the King by Deed enrolled, and before the enrollment the King granteth away the Land, the Grant is void; yet the enrollment by Relation makes the Lands to pass to the King from the beginning. Admit in this Case that *Brooker* were *Terre-Tenant*, yet he is not a party privy to bring a Writ of Error to reverse the Attaindor of him who was Tenant of the Land; and I have

have proved. That although the Attaindor were reversed, yet he hath nothing, because the Devise was void, and is not made good by Relator. It is a rule in our Books, that no man can bring a VVrit of Error but a partie or privy. 9 E. 4. 13. 22 E. 4. 31. 32. 9 H. 6. 46. b. Aff. 6. C. 3. part, in the Marquis of Winchester's Case, The heir of the part of the mother cannot have the VVrit of Error, but the heir of the part of the father may. So if erroneous Judgment be given in the time of profession of the eldest son, and afterwards he is deraigned, he shall have the Writ of Error. In 22 H. 6. 28. The heir in special taile, or by Custom, cannot have Error: But yet M. 18 Eliz. in Sir Arthur Helyningham's Case it was adjudged, That the special heir in tail might have a Writ of Error: The Baile cannot maintain a Writ of Error upon a Judgment given against the Principal, because he was not privy unto the Judgment, therefore it shall be allowed him by way of plea in a *Scire facias*. I never find that an Executor can have Error to reverse an Attaindor; but for the misawarding of the Exigent, *Marshes Case* is cited, C. 3. part 111. Fitz. 104. Feoffee at the Common Law could not have an *Andia Quarrelle*, in regard he was not privy. 12 Aff. 8. 41. *Kil-dawny* 193. There the Terrer Tenant brought a Writ of Error in the name of the heir, and not in his own name. 24 H. 8. *Dyer* 1. There it is said, That he who is a stranger to the Record shall have Error. To that I answer, That he in the Reversion, and the particular Tenant, are but one Tenant, for the Fee is demanded and drawn out of him: But in the principal Case at Barr, no Land is demanded, but a personal Attaindor is to be reversed. Also there it is put, That if the Conusee extend before the day, there it is said that the Feoffee may have Error. 17 Aff. 24. 18 E. 3. 25. Fitz. 22. To that I answer, That the Feoffee is privy to that which chargeth him, for the Land is extended in his hands; and if the Feoffee there should not have a Writ of Error, the Law should give him no manner of remedy; for there the Conusor himself cannot have Error, because the Lands are not extended in his hands. Also it is there said, that the Feoffee brought a *Scire facias* against him who had execution of the Land. To that I answer, That that is by special Act of Parliament. Also there it is said, That if the Parson of a Church hath an Annuity and recovereth, and afterwards the Benefice is appropriated to a Religious house, the Sovereign of the house shall have a *Scire facias*. I answer, That in that Case he is no stranger, for that he is perpetual Parson, and so the Successor of the Parson who recovered. 12 H. 8. 8. There a Recovery was against a Parson, and there Pollard said that the Patron might have Error. I answer, That Pollard was deceived there; for it is said before that the Parson hath but an Estate for life, and then he, viz. the Patron is as a Recoverer who shall have a Writ of Error. *Dyer* 1. But the Parson hath the Fee, and therefore Pollard was mistaken as it appeareth by *Brook's Case* *fiere de Recovery* 51. 1. *H. 6.* 57. *New-*

son, A false verdict is had against a Parson, the Patron cannot have an Attaint; There is a difference if one be partie to the Writ, although not partie to the Judgment. Error 71. A *Quare Impedit* was brought by the King against the Patron and the Incumbent, and Judgment only was had against the Patron, and the Incumbent Parson brought a Writ of Error; but if he had not been partie to the Writ, he could not have maintained Error. So in Attaint, the partie to the Writ, though not to the Judgment, shall have Attaint. 44 E. 3. b. 7. But if he be not partie to the Writ, he shall not maintain Attaint; as if he pretend Joynt-Tenancy with a stranger who is not named, and the verdict pass against him, he shall not have attaint. But Jones Justice said that he might have Attaint.

Admit the first Feoffee, viz. C. might have a Writ of Error, yet Brooker in this case cannot because he is the second Feoffee; and a Writ of Error is a thing in Action, and not transferable over. C. 3. part, The Marquis of *Winchesters* Case. C. 1. part, *Albanies* Case. One recovers against A. who makes a Feoffment to B. neither the Feoffee nor Feoffor shall have Error; for he, viz. B. comes in after the title of Error, and the Feoffor shall not have the Writ of Error, because he is not a partie griev'd. 34 Eliz. in the Common Pleas. *Sherrington* and *Worsleys* Case, *Sherrington* had Judgment against *Worsley*, and afterwards acknowledged a Statute to B. *Sherrington* sued forth Execution, B. brought Error upon the Judgment, and it was adjudged that it would not lie; First because he was a stranger, Secondly because he came in under and after the title of Error. See the reason C. 3. part; the Marquis of *Winchesters* Case, where it is said that a Writ of Error is not transferrable. This Attaindor doth not work upon the Land; and so it doth not make the Terre-Tenant privy, but it works upon the person and blood of *Henry Isley*, the Land is not touched: For *Henry Isley* was attainted in the life of his Father, and so it did not touch the Land. For if *Henry Isley* had died without issue in the life of his father, the youngest son should have had the Land by descent; which proves that it works not upon the Land, but upon the person. *Banks* for the Plaintiff, and he desired that the *Oustlawrie* might be reversed: As this Case is, there is no other person who can maintain Error. *Henry Isley* had his pardon before the *Oustlawrie*, but he came not in to plead it; and now having enjoyed it so long a time, we hope a Purchaser shall be favoured before him who begs a concealed title. The first Exception was taken: To the Devise by a person attainted. I answer, That that is but the conveyance to the Writ of Error. Secondly it was said, that none but privies or parties could maintain Error; and the adverse partie would disable the heir on the part of the Mother, and by Custome. Thirdly, he would disable the Feoffees and make them as strangers. First the *Oustlawrie* was 20 Eliz. against *Henry Isley*, which was after the seisin of the

the Land; and *Brooker* is a party able to bring a Writ of Error, being the heir of the purchasor. Error and Assaint go with the Land, 13 H. 4. 19. *Dyer* 90. *Br. Cases* 337. But Estopels and Conditions go to the heir, *Fitz.* 21. Error brought by a special heir. It is not necessary that alwaies the heir and partie to the Record have the Writ of Error, but sometimes he who is grieved by the Record. A *Scirefacias* is a Judicial Writ founded upon a Record, and hath as much in privy as Error; and yet a stranger to the Record shall have it. 16 H. 7. 9. The heir of the purchasor brought a *Scirefacias* to execute a Fine; It was objected that he was not a partie to the Record; but it was resolved in respect he was to have the benefit, that he was a sufficient person to maintain the Writ. 17 *Ass.* 24. 18 E. 3. 25. Execution was upon a Statute before the time that it ought to have been, and a Feoffee brought Error; It was objected that he was not partie, nor privie to the Record; yet because he was grieved by the Execution, he did maintain the Writ of Error. *Trin.* 34 *Eliz.* in the Kings Bench, *Sherrington* and *Worsleys* Case, (not rightly remembered) *Sherrington* did recover in debt against *Worsley*, who aliened the Land to *Charnock*; afterwards an *Elegit* is awarded upon the Roll: and *Charnock* brought Error, and it was admitted good, and *Sherrington* forced to plead to it: Now in the principal Case we are the partie grieved by the *Outlawrie*, and therefore may maintain the Writ. 21 H. 6. 29. A Reversioner, or he in the Remainder without aid, prayer, or Resc: shall have a Writ of Error, because they are damnified, although they be not parties to the Record. I agree, that where one is not grieved by the Judgment, there a stranger shall not have Error. 21 E. 4. 23. A Recovery is in Debt, and the Defendant is taken and escapes, the Sheriff shall not have a Writ of Error, for he is not grieved by the Record, but by the escape. 2 R. 3. 21. The Principal is Outlawed in Felony, afterwards the Accessory is condemned, he shall not have a Writ of Error to reverse the *Outlawrie* of the Principal; for he is not grieved by that *Outlawrie*, but by his own Condemnation. Another Objection was, because here was an *Outlawrie* against him, and therefore he shall be disabled to sue & answer. Our Writ of Error is brought to reverse that *Outlawrie*; and we shall not be rebutted by that *Outlawrie*, when we are to reverse it. 7 H. 49. 40. Error brought to reverse an *Outlawrie*, the Defendant would have disabled the Plaintiff by another *Outlawrie*, and it was not allowed because he seeks to avoid it. 10 H. 7. 18. For the Mastership of an Hospital, Exception was taken to the Writ, because the Assise is brought to undo the name of Master; and therefore he ought not to name him Master. 21 H. 6. 26. Abbot and Covent, the Abbot is preferred, and the Covent elected another Abbot; And the Patron brought a *Quare Impedit* to defeat the Election: It was ruled, because he goes about to overthrow the Election, he need not name him Abbot. *Garramy* 29. and 18 E. 3. 8.

to the same point. The writ of Error is not abated to the Writ of Error, and the writ shall not be abated for surplage. 9 E. 4. 24. 7 E. 4. 19. Surplage is no bar nor Estoppel. The Outlawrie was against Henry Myrard Pickham, and wants these words, *Nec eorum alter compariat*. Doolen's Justice. For lay where a freeman shall have a writ of Error, in a large field. If this freeman bring Error and reverse the Judgment, he must restore the heir in blood, and who can have a Writ of Error to restore blood; but he who is privie in blood, and that is the heir. Jones's Justice, *Marsh's Case*, C. 8. part III. was never adjudged. There an Executor could not reverse an Attainder by Outlawrie, because it doth restore the blood. The Case of *Sherington* and *Charlock* was to reverse the Execution and not the Judgment. An Executor shall have a general Writ of Error to reverse an Outlawrie. It was adjourned.

Pasch. 3 Car. in the Kings Bench.

466.

GUNTER and GUNTER's Case.

A Writ of Error was brought to reverse a Judgment in the Court of *Ely*, and divers Errors were assigned. First that he did not shew in the file of the Cause, how *Ely* hath power to hold plea, either by Charter or by prescription: Secondly because he said, That at such a place in *Ely* he did promise, but did not shew that it was within the Jurisdiction of *Ely*: Thirdly, that it was upon a Consideration to surcease a Suit in the Chancery that the Defendant did promise; but did not shew that at the time of the promise there was a Suit depending: Fourthly it was said, That the Defendant did promise to surrender certain Customary Lands; and it is not shewn what the Lands were; and so no certainty for the Jurie to give damages. *Sermys* argued for the Defendant in Writ of Error, and said, The Declaration is good in substance, *Diversas terras Customarias prohem. adiacend. lib. tenem.* of the Defendant; and the Defendant pleaded that he had offered *predict. tenem. Customarias*; and so no difference is betwixt them; for that Tenement is sufficiently known; and although it be not so certainly laid as it ought to be in a real Action, yet it is certain enough in an Action upon the Case. *Dyer* 355. 360. Only who was Solicitor to the Council of D. did spend 1500*l.* circa *lib. tenem.* & *agris*, there the Declaration was sufficient by two Judges, there the Lands are certain, viz. *proxem. lib. tenem.* Secondly, *Ely* is in the Margent, which is as much as the County in the Margent; and then when no County is named in the Declaration where in the land doth lie, it shall be intended to lie in the County which is in the Margent.

Hutley

History. Our Case differs from *Onslow's Case* in *Dyer* 355. For there 1500. was received. But if I bring an Action upon the Case *pro diversis merchandisi*, the same is not good; but if I bring the Action for 10*l. pro diversis merchandisi*, then it is good. *Jones* Justice, *Chester* and *Durham* are generally known; and therefore it is good to say *Placita tenentur apud Chester, &c.* and the party need not shew how *Chester* hath Jurisdiction: but it is not so of *Ely*. *Whitlock* Justice, *Ely* hath *Jura regalia*; and we read in our books, that they have had *Consuls of Pleas*: *Hyde* Chief Justice. In all particular and private Jurisdictions, if they come to be certified here in a Writ of Error, you must set out their power. But if they have their power by a Statute, as *Wales*, then it need not be set forth. A Writ of Error doth not lie upon a Judgment in *London*, but when the Plea is before Commissioners. *Curia*. We cannot grant a new *Certiorare* to an inferior Court, but only to the Common-Pleas, or *Wales*. The writ of Error to remove the Record out of the Court of *Ely* is directed *Justiciario nostro*, which proves that this Court takes notice of him as the Kings Justice: And in other Courts it is *Senescallo Curie*, and not *Senescallo nostro*. *Whitlock* Justice, It is since the Statute of 27 *H.8.* that it is directed *Justiciario nostro de Ely*; for before it was *Justiciario Episcopi*. *Hyde* Chief Justice, It is a Book-Case: If *Midd.* be in the margin, and you say *apud D.* and name no County, *D.* shall be intended to be in *Midd.* The Judgment was reversed.

Pascb. 3 Caroli, in the Kings Bench.

467. WATERMAN and CROPP's Case.

Inratnr M. 2 Car. Rot 419.

AN Action of Trespas for Battery and Imprisonment. The Defendant did justify the Imprisonment, &c. If it be not a Court of Record, they cannot fine and imprison; but if it be a Court of Record, then they may, for it is *Curia Domini Regis*.

468.

IN a Writ of Error, Error was assigned, That an Action was laid in *Lanceston*; and the *Venire facias* was awarded *de vicineto de Lanceston*. And it was said, That the neighbourhood might be of those of which the Mayor and Bailiffs had no power over, viz. those out of their jurisdiction: And therefore Error was assigned in the mis-awarding of the *Venire facias*. 10 *Jacobi* in the Common-Pleas, *Buckley's case*, There the

the *Venire facias* was *de vicineto civitatis Eborum*, and well enough, for (*vicineto*) shall imply those within the jurisdiction, and not the neighbours. To *Jacobi*, Procter and Cliffords case adjudged contrary, where it was, That the *Venire facias* was *de vicineto civitatis Coventry*, and adjudged not good, for it ought to have been *de civitate Coventry*.

Dodderidge. (*Vicineto*) goeth about the Precinct. When I was a Councillor, then I moved for *Bristol*, and to maintain it good *de vicineto de Bristol*: but it was ruled not good, but ought to be *de civitate Bristol*.

Pasch. 3. Caroli, in the Kings Bench.

469. TOLLYN and TAYLOR's Case.

AN Action upon the Case was brought in the Common-Pleas by an Infant who declared by Attorney. The Defendant brought a Writ of Error in the Kings Bench, and assigned the same for Error, For he ought to have declared *per Prochyn amy*, and not by Attorney. If an Action be brought, and the Defendant plead that he is an Infant, the Infancie is to be tryed where the Writ is brought. Here he assigns the Error in fact that he was an Infant, and shewed no place where he was an Infant, and so no place set where to prove it. To this Error the Plaintiffe pleaded, That he was at full age. And upon that they are at issue upon this matter in fact. And it was tryed at *Halfsworth* in *Suffolk*, whereas it ought to have been in this Court where the Infancie is pleaded, because he names no place where he was of full age. And notwithstanding that it was found that he was of full age, yet the Trial was not good. The first Action was brought before the Statute of 21 *Jacobi*, cap. 13.

Hitcham Serjeant, Age or not age is not local; and a place must be set down for formalitie sake, and so it is no matter of substance. And the *Venire facias* might be awarded from the place where the first Action was, *viz.* at *Halfsworth* in *Suffolk*: For that is a matter dependant and pursuant the first Action, and now since the Statute is helped. *Denny* contrary, It hath no dependance upon the first Action, but is a new thing sprung up. If any place had been set down, and the *Venire facias* had been mistaken, that is helped by the Statute, and not where no place is set down at all. *Whitlock* Justice, Every *Venire facias* properly is to be from the place where the Writ is brought, unless it be drawn away by Plea. He ought to have alleadged a place; For this is a new matter in this Court, and not helped by the Statute of 21 *Jacobi*, nor any other, for the *Venire facias* is totally mistaken. *Dodderidge* Justice, The Statute

tures of *Joſaphat* have ever been taken ſtrictly according to the letter: For if they had been taken by equity, what need had there been of more Statutes to have been made? The want of a letter out of a word, is out of the Statute, C. 8. *pari*. You ſhould have alleadged ſome place: The Statute of 21 *Jacobi* is not of any *Venire facias* which is miſawarded generally: but the Statute helpeth when there are two places, and the *viſne* ought to come from both places, and the *viſne* comes but from one place; and when there is but one place, and the *viſne* comes from two places. If *Enſancie* be to be tryed (*ſc.*) If he were at ſuch a time within age, it ought to be tryed by the Country. This matter is collateral to the firſt Record, and it is a new Record (*ſc.*) upon Error.

The whole Court was of opinion that it was out of the Statute, and a Repleader was granted. *Whitlock* Juſtice, There is no Trial at all, for there is no *Venire facias* at all. *Dodderidge* Juſtice, If the Defendant in Error plead an ill plea, he ſhall replead: But if in this Action he had alleadged a place of his *Enſancie* (*ſc.*) at *Dale*, and the *Venire facias* had been of *Sale*, there it had been good trial; and there he ſhould not replead, for that he hath pleaded well; but there he ſhall have a *Venire facias de novo*.

Pasch. 3 Caroli, in the Kings Bench.

470.

DAY'S Case.

DAY was Indicted for erecting of a Cottage. It was moved, that the Indictment was insufficient, for that the words of the Statute of 31 *Eliz. cap. 7.* are, (*Shall willingly uphold, maintain, and continue*) And the Indictment is only, *That he continued*, and ſo wants the words (*voluntarily uphold*) according to the Statute. 2. It did not appear in the Indictment that it was newly erected; for it is only that he continued, but not that he erected. The Indictment was quaſhed, becauſe being a penal Law, it was not purſued.

Pasch. 3 Caroli, in the Kings Bench.

471.

MAN'S Case.

MAN was Indicted, That he *ſuit & adhuc eſt* a common Barrettor, and no place is expreſſed where he was a Barrettor, ſo as

no trial can be. *Daddridge* Justice, If he be a Barrator in one place, he is a Barrator in all places. The Indictment was, *Per quod* he did stir up contentions, *furges*; And no place alleadged where he did stir up *furges*, contentions. And it was said that in that case the place was very material: And so the Indictment was quashed for want of setting forth the place where he did stir up many Contentions, *furges* &c.

Pasch. 3 Caroli, in the Kings Bench.

472.

GREEN and MOODY's Case.

AN Action of Debt was brought for Rent; and it was found for the Plaintiff. *Thyn* Serjeant moved in arrest of Judgment, and set forth the Case to be, That a Lease was made for years to begin at *Michaelmas* after; And the Plaintiff in the Action of Debt for the Rent did declare, *Virtute cuius* the Lessee did enter, and did not shew what day, according to *Cliffords* Case 7 E. 6. *Dyer* 89. But the Court said, It is said in this Case, *Virtute cuius dimissionis* he did enter and was possessed; and that must be intended at *Michaelmas*. *Alexander* and *Dyer's* Case, 33 Eliz. was resolved accordingly. And *Cliffords* Case, *Dyer* 89. is not *virtute cuius dimissionis*. And the Court held a difference betwixt Debt and *Ejectione firme*: *Cliffords* case was an *Ejectione firme*, but here it is Debt. *Jones* Justice, If he did enter before *Michaelmas*, yet Debt will lie for the Rent upon the privity of contract; for the Lessee cannot destroy the contract, unless he make a Feoffment. It was adjudged for the Plaintiff.

Quare, If when the Lessor in the case which *Jones* put hath brought his action and recovered when the Lessee hath entred before the day, If the Lessor shall put him out as a Disseisor by reason of the Recovery in the action of Debt, in which he hath admitted him to be Lessee for years: Or if the Lessor after he hath recovered in Debt dyeth, whether his heir shall be estopped by the Record to say otherwise then that he is in by the Lease; Or whether the Recovery in Debt hath purged the wrong. Like unto the Case 14 H. 8. 12. by *Carret*. If one entred into my lands, and claims 20 years therein, and I suffer him to continue there and accept of the Rent, and afterwards he committeth Waste, I shall maintain an action of Waste, and declare upon the special matter. If one entred into my Land claiming a Lease for years, *per Curiam* he is a Disseisor, and he cannot qualifie his own wrong, *Dyer* 134. *Traps* case. But Sir *Henry Yelverton* said, That I may admit him to be Tenant for years, if I accept of the Rent, or bring Waste, as *Carret* said 14 H. 4.

But

But he hath not but for years, in respect of his claim: But I am concluded by acceptance of the Rent, or by bringing of the action of Waste. So here by the bringing of the action of Debt, the Lessor is concluded. But *Quere* if it shall bind his heir. It was conceived it shall, because it is by Record, the strongest conclusion that is.

Pasch. 3 Caroli, in the Kings Bench.

473.

SMITH'S Case.

A Lease for years was made of Lands in *Middlesex*, and the Lessor brought Debt in *London* against the Assignee. The opinion of the whole Court was, that it was not well brought, but the Action ought to have been brought in *Midd. Jones* Justice, Debt for Rent upon the privity of Contract may be brought in another County; but if it be brought upon the privity of Estate, as by the Grantee of the Reversion, or against the Assignee of the Lessee, then it ought to be brought in the County where the Land is. *Quod nota.*

Pasch. 3 Caroli, in the Kings Bench.

474. CREMER and TOOKLEY'S Case.

A N action of Debt was brought for suing in the Court of Admiralty against the Statutes of 13 R. 2. cap. 5. & 15 R. 2. cap. 3. whereby it is enacted, That of manner of Contracts, Pleas and Complaints arising within the body of the Counties as well by land as by water, the Admiral shall in no wise have consens: And the Statute gives damages, part to the party, and part to the King. And the Plaintiff in the action of Debt did declare, That the Defendant Tookley did implead Cremer the Plaintiff in the Court of Admiralty; And in his Declaration set forth, That one Mullbeck was Master of a Ship, &c. and that the Contract was made in *London*; And that Tookley the Defendant did force the Plaintiff to appear, and prosecuted the suit upon the Contract in the Admiral Court. And by special Verdict it was found, That a Charter-party was made between Mullbeck and Cremer at *Dunkirk*, And that Tookley did prosecute Cremer in the Admiral Court by virtue of a Letter of Attorney; and so that he as Attorney to Mullbeck did prosecute the suit there.

The Case was argued by *Audrenes* for the Plaintiff. There are two points: The first upon the Jurisdiction, of the Admiralty, the Contract being made at *Dunkirk*, but to be performed in *England*: The second, If *Tookley* being the Attorney, be such a party prosecutor as is within the Statutes. The ancient Law of the Admirals Jurisdiction appears in our Books. 8 E.2. *Corone* 399. *Staunton* Justice, It shall not be accounted the Sea, where a man may see the land over the water: And the Coroners were to do their office in such case, and the County was to take notice thereof, 40 *Ass.* 25. *Stamford* 11. This Commission was at the Common-Law before the Statutes of *Pyracie*. 46 E. 3. *tras.* 38. *Stattham* It is pleaded that the Defendant took the goods as *Pyracie*, &c. I infer thereupon that it was a good Justification. 7 R. 2. *tras.* 54. *Stattham*, *Trespals* was brought for a Ship and Merchandises taken upon the Sea, and holden good; which proves that the Common-Law had jurisdiction upon the Sea, and not the Admiral. 6 R.2. *Protection* 46. *Protection quia profecturus super altum mare*. *Belknap*, The Sea is within the Kings jurisdiction; and the Sea is as well in the Kings protection as is the Land.

It may be objected, That the Contract was made at *Dunkirk*, and so out of the body of the County; and so our Law cannot take notice of it; and if the Admiral shall not have jurisdiction in such case, it should remain undetermined. To that I answer, If all the matter were to be done at *Dunkirk*, then all were a Marine case, and the Admiral should have jurisdiction; but if any part were to be done in *England*, then it is otherwise. *M.* 30, 31 *Eliz.* C. 6: part 47. in *Dowdales* case. In an Action upon the Case upon *Assumpsit*, the Plaintiff did declare, That the Defendant at *London* did assume that such a ship should sail from *Melcomb Regis* in *Suffolk* to *Abvile* in *France*: The Issue was tried in *London*, because the Contract was made in *England*. *Pasch.* 28 *Eliz.* *Gynne* and *Constantines* Case: there because it was part upon the Sea, and part upon the Land, the tryal was at the Common-Law, and not in the Admiral Court. 48 E. 3. 2. One did retain three Esquires to serve in *France*; there because the Reteiner was here, the tryal was here. If a Mariner contract with me for wages to sail in such a ship, he shall demand his wages at the Common-Law, and not in the Admiral Court. *vi.* 39 *H.* 6. 39. There a *Protection super vesilationem Calissa*, &c. cannot be *moraturus*, because that the Sea is ever ebbing and flowing, and doth not stand still. So that if any part of the Contract be to be done upon the Land, then Common-Law shall have the jurisdiction. Wreck of the Sea shall be tried at the Common-Law, because it is cast upon the Land. *Dyer* 326. 2 E. 1. *Avowry* 192. A *Replevin* was brought of a ship taken upon the coast of *Scarborough*, and carried into *Norfolk*; and it was alleged to be within the Statute of *Malebridge* for taking a Distress in one County, and carrying of it into another County.

Bereford,

Bereford, The King wills that the Peace be kept as well upon the Sea as upon the Land And our Case differs from *Lacy's case*, C. 2. part 1: For in that case of Felony it is meer local; but Contracts are not so local. The second point, Whether this be a prosecution within the Statutes, because it was done by vertue of a Letter of Attorney from *Mullibeck*, 32 E. 3. barr. 264. *Annuity* 51. *Qui per alium facit, per seipsum facere videtur*. The Statute of *Merton* cap. 10. gave power to make Attorneys in any Court, *Com.* 236. but the Attorney must look at his peril that that which he doth be a lawful act. Here *Mullibeck* himself could not have justified this prosecution, nor shall his Attorney, 9 H. 7. 24. 28 H. 8. 2. *Quod per me non possum, per alium non possum*. If an *Esne* make a Letter of Attorney to make Livery and Seisin, and the Attorney maketh Livery accordingly, he is a Disseisor. C. 10. part 76. If the Court have not jurisdiction of the Cause, the Minister must look to it at his peril, otherwise he is punishable. *Tras.* 253. One may do that himself, which he cannot do by Attorney: The Lord may beat his villein; but a stranger cannot do it for the Lord: the Lord may distrein for Rent when it is not behind, and the Tenant shall not have trespass; but if the Bailiff distrein when no Rent is arrear, trespass lieth against him. 2 H. 4. 4. 9 H. 7. 14. In Trespass all are Principals. Then the Attorney here and *Mullibeck* are both Trespassors against the Statutes: And the doing of the Attorney at the command of the Master shall not avail him. *vi. Dyer* 159. doth conduce to the reason, that the Attorney shall be punished. It seems this suing in the Court of Admiralty is a Contempt, for it is *malum prohibitum*; and so either *Mullibeck* or the Attorney are punishable. And in this case the Plaintiff hath his Election to sue *Mullibeck* or the Attorney; and therefore having sued the Attorney, the Action brought against him will well lie.

Calthrop for the Defendant. It was objected, That the Court of Admiralty did begin but in the time of King *Edm.* 3. But *Dyer* 152. proves the contrary: For there in an Assise brought of the Office of Admiralty, the Plaintiff doth declare the same to be an Office time out of mind &c. which proves it to be a more ancient Office: And in the Statute of 2 H. 5. cap. 6. There the words are to enquire of all offences &c. as the Admirals after the old custom; which proves that it is an ancient Office. It's true, *Avowry* 192. makes against me; but the Notes of that Case in writing proves that the book is misprinted. I confess, if part of the thing be to be done here upon the Land, that it is triable at the Common Law. The Defendant in this our Case is not liable to the penalty, because at the time of the making of these Statutes it was not known that any Charter-partie was made beyond the Seas. 2 E. 3. *Oblig.* 15. Debt was brought upon an Obligation made at *Barwick*; where because this Court had not jurisdiction, It was adjudged, That the Plaintiff *nihil capiat per breve*. *Testament* 16. A Testament bore date at *Caen* in *Normandy*, which

which was proved in *England*: *Pole*, Upon an Obligation which bears date in *Normandy*, a man shall not have an Action here; but it is good in case of a Will proved here. 6 E. 3. 17, 18. The Abbot of *Crawland* granted an Annuity, and the Deed was made in *Scotland*: If the Deed had been the ground of the Action, then the Action would not have lien; but because the Deed bore date before time of memory, the Annuity did lie; for the Action was not brought upon the Deed, but upon the Prescription. 1 E. 3. 1. 18. 8 E. 3. 51. It is ruled, where the title is made by a Deed which bears date beyond Sea, that the Action will not lie. 13 H. 4. 5 & 6. An Obligation bore date in *France*, and was made according to the Law of *France*. 6 R. 2. cap. 2. Where the Specialtie bears date, there the Action shall be brought. The first book that speaks of Deeds bearing date out of *England*, 20 H. 6. 28, 29. 20 E. 4. 1. 21 E. 4. 72. You must suppose then, That it was at a place in *England*; and that is but a fiction of Law, and you shall never make a man subject to the penalty of a Statute upon a fiction of Law. C. 31. part 51. A Disseisor makes a Lease for life or years; the Disseisee shall not have an Action of Trespass *vi & armis* against him, because he comes in by title: For this fiction of Law, That the Frank-tenement hath always been in the Disseisee, shall not have Relation to make him who comes in by title to be a Trespassor *vi & armis*. 18 H. 6. 23. A Reversion is expectant upon an estate for life; and in the mean time betwixt the Grant and the Attornment the Lessee commits Waste: yet although the Attornment relate to make the Grant good *ab initio*, yet the Relation being a fiction of Law will not make the Lessee punishable for Waste. Then in this our Case, the Deed bears date beyond the Sea; and then to make *Dunkirk* to be in *England* by a fiction in Law, shall not be prejudicial to the Defendant. Com. 369. The preamble of a Statute is the best Interpreter of the Statute. In the Statute of 13 R. 2. the preamble saith, *Because the Admirals and their Deputies do hold their Sessions &c. in prejudice of the King and of the Common-Law, and in destruction of the common people, &c.* But this Deed bearing date beyond the Sea, is no prejudice to the King, nor to his Franchises, nor to his people to be sued in the Admiralty. 23 R. 2. H. 8. cap. 14. The suit within the Admiralty ought to concern Charter-partie, and Freight of a Ship. For by that Statute it was enacted, That if any Merchant-stranger (as *Mullisheck* was) by long delaying and protracting of time (as in our Case) otherwise then was agreed between the said Merchants in or by the said Charter-partie, &c. shall have his remedy before the Admiral, which Lord Admiral shall take such Order, &c. In our Case at Bar, It was a Charter-partie made beyond Sea. 1. It was for the freight of a Ship. 2. For the breach of it was the the suit in the Court of Admiralty. But admit that this point be against me, then for the second point I do conceive, that he who is punishable by the Statute must be Prosecutor, which the Defendant

feindant is not; for what he hath done, he did by vertue of a Letter of Attorney, and he did it in the name of another, and it is the Act of the other. *C. 9. part 76. Combes Case*, If a man have power to do an Act by force of a Letter of Attorney, it ought to be done in the name of him who gives the power. *3 Ma. Dyer 132.* If Surveyors have power to make Leases, if they make the Leases in their own names, it is not good; but they ought to be made in his name who giveth the power. *11 Eliz. Dyer 283* The Statute of *R. 3.* giveth power to *Cestuy que use* to make Leases, and he makes a Letter of Attorney, the Attorney must make the Leases in the name of *Cestuy que use*, who hath the power by the Statute. *C. 9. part 75.* A Copyholder may surrender by Attorney, because it is his own surrender. *Vs Perkins 196. 199.* A Feoffment with a Letter of Attorney to the wife to make Livery, is good; but then the wife must make the Livery in the name of her husband. Secondly, in this Case at Barr, the beginning and the prosecution of the Suit was altogether for the benefit of *Mullibeck*, and so it appears by the Records of the Court, and no notice is there taken of the Attorney but of the Master. *L. 5. E. 45.* A Writ is directed to the Sheriff, and the Under-Sheriff makes a false return, the Sheriff shall be amerced; and not the Under-Sheriff, for the Law doth not take notice of him. *7 Eliz. Dyer 239.* The Customer himself and not his Deputie, shall be charged. And so in our Case *Mullibeck* being partie to the whole, ought to be accounted the partie prosecuting within the words of the Statutes. The Statute of *4 H. 7. cap. 27.* is so as they pursue their claims within five years; such prosecuting or pursuing ought to be by the partie himself. *C. 9. part 106.* If one of his own head make claim, it is not good claim for to avoid the Fine, &c. The Statute of *16 R. 2. cap. 5.* of *Premunire* makes against me; for there the Procurours, Councillors, Sollicitors, Abettors and Attorneys are named by the expresse words of the Statute, and there is an expresse provision against them: But in our Case it is not so; for if our Statute had intended to extend to Councillors, Attornies, &c. it would have expressly named them. There are divers exceptions which I take to the Verdict. First, There is variance in the place, betwixt the Declaration and the special Verdict; for the Declaration layeth the Contract to be made at *Dunkirk* in *England*, and the special Verdict finds it to be made at *Dunkirk extra partes transmarinas*. Secondly, The Declaration is to take in Mariners, and the special Verdict is to take in Men. Thirdly the Declaration is, A Ship to be prepared, and the Verdict is to be in readiness. Fourthly, The Statute of *15 R. 2.* and *2 H. 4.* gives the Action by way of Writ; and here it is by Bill. *42 Aff. 11.* There one was taken in Execution and escaped, and there a Bill was exhibited for the escape: and it was holden because the Statute of *West. 2.* gave a Writ of Debt, it shall not be extended by equity to a Bill of Debt. *Com. 38. a.* and *Com. 36. 37. Pless Case.* There.

390 *The Chancellor of Gloucester's Case.*

There the Judgment is given upon a Bill for an escape; but Mr Plowden said that it seemed to divers a hard Case. The Statute of 18 Eliz. cap. 5. of Informers is in the negative, viz. That none shall be admitted or received to pursue any person upon any penal Law, but by way of Information, or original Action, and not otherwise. Mich. 29 Eliz. in *Clark's Case* it was resolved, that the Statute of 18 Eliz. was a penal Law, and the partie must not be sued by Bill, but as the Statute hath prescribed. 27 H. 6. 5. There upon *Premunire facias*, it was adjudged good by Bill; but there the Action was not directed so precisely by the Statute, viz. in what manner the partie should proceed. There are no precedents that an Action of Debt hath been brought for pursuing in the Court of Admiralty, but in such Case a Prohibition granted only: and for these causes he prayed Judgment for the Defendant. Observe Reader, the Argument of *Calthrope*; he doth not speak to the point, where part of the thing or Contract is upon the Sea, and part upon the Land, as it was urged by *Andrews* who argued on the other side. The Case was adjourned.

Pasch. 3 Caroli, rot. 362. in the Kings Bench.

475.

IT was cited to be adjudged, That if a man purchase the next Avoidance of a Church, with an intent to present his son, and afterwards he present him, that it is *Symony* within the Statute.

Pasch. 3 Caroli, in the Kings Bench.

476. SUTTON the Chancellor of Gloucester's Case.

IN the Case of *Sutton* who was Chancellor of *Gloucester*, and put out of his place for insufficiency in the Ecclesiastical Court, *Trotman* moved for a Prohibition to the Spiritual Court, and said that the Bishop had power to make his Chancellor, and he only hath the Examination of him, and the allowance of him, as it is in the Case of a Parson who is presented to the Bishop, and said, that if his sufficiency should be afterwards reexamined, it would be very perilous. *Doddridge* Justice, If an Office
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of Skill be granted to one for life who hath no skill to execute the Office, the grant is void, and he hath no Frank-tenement in it. A Prohibition is for two causes: First to give to us Jurisdiction of that which doth belong unto us: And secondly, when a thing is done against the Law, and in breach of the Law, then we use to grant a Prohibition. *Jones* Justice, *Brook* had a grant of the Office of a Herald at Arms for life; and the Earl Marthal did suspend him from the execution of his Office, because he was ignorant in his profession, and full of Error contrary to the Records: and it was the opinion of the Justices, that because he was ignorant in such his Office of Skill, that he had no Freehold in the Office. In the Principall Case, the Prohibition was denied: And afterwards *Sutton* was put out of his Office by Sentence in the Spiritual Court, for his insufficiency.

Pasch. 3 Caroli, in the Kings Bench.

477.

SYMM'S CASE.

TWO men having speech together of *John Symms* and *William Symms*, one of them said *The Symmses make Half-crown peeces*, and *John Symms* did carrie a Cloak-bag full of clippings. And whether the Action would lie was the Question, because it was uncertain in the person; For he did not say *These Symmses*, but *The Symmses*: Like unto the Case where one *Farrer* being slain, and certain persons being Defendants in the Star-Chamber, one having speech of them, said, *These Defendants did murder Farrer*; and it was adjudged that the Action would not lie, for two causes: First because the words (*These*) was uncertain in the person: And secondly it was uncertain in the thing; For it might be that they had Authority to do it, as in *Mills Case* 13 Jac. in the Kings Bench, *Thou hast Coynded Gold, and art a Coyner of Gold*. Thirdly, a Cloakbag of clippings, that is also uncertain; for it might be clippings of Wooll, or other things; or it might be clippings of Silver from the Goldsmith; For the Goldsmith that maketh Plate, maketh clippings: And fourthly, It is not shewed any certain time when the words were spoken: And for these causes it was adjudged that the Action would not lie.

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Pasch. 3 Caroli, in the Kings Bench.

478.

WHITTIE and WESTON'S CASE.

AN ACTION of Debt was brought upon the Statute of 2 E. 6. and the Plaintiff declared, That at the time of the Action brought, he was Parson of *Merrel*, and that *Weston* the Defendant did occupie such Lands, and sowed them with corn. *Anno 21 Jac.* and that he did not set forth his Tythe-corn, &c. The Defendant pleaded in barr of the Action, That *W. W.* Prior of the Hospital of *St John of Jerusalem*, was of the Order of Hospitalers, &c. and that he held the said Lands free from the payment of Tythes, and that the Priory came by the Statute of 32. H. 8. to the King: By vertue of which Statute the King was seised thereof, and that the same descended to Queen *Elizabeth*, who granted the Lands unto *Weston* to hold as amply as the late Prior held, and that he was seised of the Lands by vertue of that grant, *Et propriis manibus suis excolebat*. Upon this Plea the Plaintiff did demurr in Law. *Nay* argued for the Plaintiff, There are three points in the Case. First, If these Lands the possessions of the Hospitalers of *St John*, which they held in their own hands were discharged of Tythes. Secondly, If there be any thing in the Statute of 32 H. 8. by which the Purchasor of the King should be discharged. Thirdly, Admitting that it shall be a discharge, if the Defendant hath well entitled himself to such discharge or Priviledg. First it is not within the Statute of 31 H. 8. cap. 13. for that Statute did not extend to the Order of *St John*. Secondly, the Statute of 31 H. 8. cap. 13. doth not discharge any but what was then dissolved. Thirdly, The Statute of 32 H. 8. cap. 24. gives the possessions of the Hospitalers of *St Johns* to the King, and not the Statute of 31 H. 8.. Note that the Defendant did recite the branch of the Statute of 31 H. 8. cap. 13. That as well the King, his heirs and successors, as all and every such person and persons their heirs and assignes, which have or hereafter shall have any Monasterie, &c. or other Religious or Ecclesiastical houses or places shall hold, &c. according to their Estates and Titles discharged and acquitted of the payment of Tythes, as freely and in as large and ample manner as the said Abbots, &c. had or used: Also he recited the Statute of 32 H. 8. cap. 7. which Enacts that none shall pay Tythes, who by Law, Statute, or Priviledg ought to be discharged. The Statute of 31 H. 8. recites that divers Abbies, &c. and other Religious and Ecclesiastical houses and places have been granted and given up to the King: The Statute enacts that
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the King shall have in possession for ever all such late Monasteries, &c. and other Religious houses and places, &c. And also enacts that the King shal have not only the said Monasteries, &c. but also all other Monasteries, &c. and all other Religious and Ecclesiastical houses which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the King; and shall be deemed, adjudged, vested by Authority of this present Parliament, in the very actual possession and seisin of the King for ever, in the state and condition they now be. *Vi. The Statute.* And shall have all privileges, &c. in as ample manner and form as the late Abbots, &c. had, held or occupied, &c. The Question then is Whether the men of the Hospital of St John at Jerusalem, are intended to be within the said Statute of 31 H. 8. And I conceive that they are not: It doth not appear in the pleading, that the Priory of St John was an Ecclesiastical House, therefore it ought to have been averred. It is true, to plead that such a man hath entred into Religion, is intended that he is a person dead in Law. They were never Ecclesiastical, nor so accounted; they must be both Religious and Ecclesiastical, who are within the Statute of 31 H. 8. For the said Statute doth not extend to Religious houses unless they be Ecclesiastical. *Tryal 99.* proves that they were Religious, 21 H. 7. 7. And the Statute of Templers, 17 E. 2. do shew that they were Canonized (which is) admitted unto a Rule of their own Law, and not that they were made Saints, or that they were Ecclesiastical, 1 E. 3. 7. *Nonability 4.* They were dead persons in Law. *Feoffments 68.* proves that they were religious; but whether they were Lay or Ecclesiastical, I have not read. In the difference of Summons to Parliaments unto the Templers, the Summons is, *Vobis mandamus in fide & legentibus*; but the Summons to a Spiritual Lord is, *in fide & electione*; and so was the Summons to the Prior of St Johns of Jerusalem, but that was because he held in *Frankalmoign*, but that doth not prove him to be Ecclesiastical; for first they exercised themselves in Arms, It was part of their Order, *armis se exercere*; and that is against the Rule of the Common Law, to meddle with blood. Secondly, They used no Imposition of hands, but only a Robe, nor had they so much Ceremony as a Knight of the Bath; and yet the Knights of the Bath are not Ecclesiastical. So there is nothing in their Creation or Order, that makes them Ecclesiastical; For they were Lay-Monks of the Order of St Anthony. The Jesuites have Lay-Brethren, and not Ecclesiastical. 44. *Aff. 9.* There the Defendant pleaded in barr, That the Prior was a Lay-man, and so not under any Rule; and it is there admitted that he was a Lay-man, and yet that he might be Prior, and bring the Action in his own name, and not as Prior with his brethren, which proves that the residue were dead persons in Law. If there be professions alledged in one of the Hospitals of St John of Jerusalem, how shall it be tried? By the Country. *Tryal 99.* Profession

was alleadged in the Plaintiff, who was a Knight of the Order of the Templers; and it was commanded to certifie it: And the Bishop could not enquire of it, because the Order of a Knight Templar was exempted by the Pope: But *Trial* 98. there it was certified by the Bishop; yet all our books are contrary to it. 1 R. 3. 4. *Si professio allegata sit in quodam milite Sancti Johannis Jerusalem, quia immediate sub Papa sunt, non habere cui scribere possunt*, &c. 21 H. 7. 7. Selden 121. in his History of Tythes, that they were accounted no part of the Clergy, but meerly Lay. With us they were accounted Lay, and therefore it is not material what they were accounted of, in other places. A Colledg is a Lay Corporation: If they be disseised, an Assise must be brought. The Statute of 1. and 2. Philip and Mary is, That men might devise to spiritual Corporations, notwithstanding the Statute *de terris ad manum mortuorum non ponend.* or any other Statute to the contrary. Dyer 254. There a Devise was unto a Colledg and Grammar-School, and holden a good Devise, because the Statute of Philip and Mary ought to be favourably expounded, being for the benefit of the Corporation. I take another reason from the manner of payment of Tythes: Ecclesiastical persons payed Tythes; but no Tythes were paid by the Hospitallers of St Johns of Jerusalem. The Statute of 27 H. 8. dissolves Abbies, &c. but doth not relate to any formerly given up, &c. and the reason was, because they were but petty Abbies. The Statute of 31 H. 8. dissolves none; but recites that whereas divers have given up, &c. or were to be given up, but shews no reason; for divers Inquisitions issued forth to enquire of their Lands; but the Statute of 32 H. 8. doth not shew any such reasons, but other reasons; because that *Rodes* was taken away, and that they held of the Pope. And if they were dissolved by the Statute of 31 H. 8. then what need a Statute the next year after, viz. 32 H. 8. to dissolve the Corporation? By the Statute of 26 H. 8. cap. 3. the King hath the first Fruits and Tenths of all that shall be promoted to any Benefice or promotion spiritual. This doth not extend to St John of Jerusalem; and therefore afterwards in the same Statute it is Enacted, That every one which shall be elected, or by other means appointed to the Dignity of the Prior of St Johns of Jerusalem, shall before their real and actual entrie into the Dignity or medling with the profits, satisfie the King, &c. Now if they were intended in the words *Spiritual promotion*, it was in vain anew to enact for them. The Act of 32 H. 8. extends to Ireland, and so doth not the Statute of 31 H. 8. the Statute of 31 H. 8. extends only to Ecclesiastical and Religious; so they were not intended within the Statute of 31 H. 8. Next, If they were intended within the Statute of 31 H. 8. then the Statute of 32 H. 8. gives them absolutely by name to the King: The Statute of 32 H. 8. gives nothing to the King, but those that are or were to be given up, forfeited, surrendered, or otherwise given up; but gives nothing to the King but by the help of
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some other Act, viz. forfeiture, surrender, or otherwise given up. The word (Otherwise) never intended Dissolution by Act of Parliament; for that is *paramount* the particulars recited. The Statute of *Malebrius*, cap. 30. n. *Provisum est quod si depredationes vel rapini aliqui fiant Abbatibus, &c. vel aliis Prelatis Ecclesiasticis, &c.* That Statute never intended to extend to Bishops, who are *paramount* and superior to Abbots: The word (*aliis*) will bear no such sense, to make the superior to be intended, when as the inferior is recited. The Statute of 13 *Edw.* recites, That no Colledg, Dean and Chapter, Parsons, Vicars, &c. may make a new Lease, unless within a year of the end of the Lease in being. Now a Bishop is superior and above these particularly named, and may make concurrant Leases: so here the word (Otherwise) doth not intend that (Otherwise) to be by Act of Parliament, and to extend to greater then the particulars recited. The Statute of 32 *H. 8.* sayes that the Corporation shall be dissolved and void; but the Statute of 31 *H. 8.* doth not say that the Corporation shall be dissolved and void. The Statute of 32 *H. 8.* sayes that the Corporation and possessions shall be in the King by vertue of that Act; then not in the King by vertue of the Act of 31 *H. 8.* A Feoffment in Fee is made unto the use of *A.* in Tail, he hath the Use by the Statute of *West. 2.* cap. 1. Now when the Statute of 27 *H. 8.* cap. 10. came, he hath the possession by force of that Act, viz. of 27 *H. 8.* and not by force of the Statute of *West. 2.* If the King be not in by the Statute of 31 *H. 8.* then he shall not have every of the Priviledges which the Act of 31 *H. 8.* giveth. C. 2. *parr.* The Bishop of *Canterburies* Case. The Colledg of *Maidstone* was Religious, but not Ecclesiastical; and it was adjudged that the Purchasors of the Lands of the said Colledg were not discharged from the payment of Tythes, because the Colledg was not Ecclesiastical, but Religious only; and Religious and not Ecclesiastical, came not to the King by the Statute of 31 *H. 8.* 18 *Jacobi*, in the Common Pleas, *Wrights* Case; The Priory of *Hatfield* being of small value, viz. not having Lands of the value of 200*l. per annum* was dissolved by the Statute of 27 *H. 8.* and the Lands were not Tythe-free in the hands of the Purchasors, because the Priory came not to the King by the Statute of 31 *H. 8.* and yet they were Tythe-free in the hands of the Prior himself.

The second point upon the Statute of 32 *H. 8.* The words are, That the King shall have all Rights, Interests and Priviledg, as it was in the hands of the Abbots, Priors, &c. It is objected, To be free from payment of Tythes is a Priviledg: I answer, That neither Right, Interest, nor Priviledg do free him from the payment of Tythes: First, there is no discharge of Tythes by the word (Interest) in the Statute, for that is plain; Then the question is, if the word Priveledg will discharge the Lands from the payment of Tythes; and if that word would have suf-

ficed to have discharged the Tythe, what need was there of the special Clause to discharge Tythes? The Statute of 27 H. 8. dissolves Chauntries, and there it is said, That the King shall have and enjoy, &c. and there also all Priviledges are given; then the Statute of 1 E. 6. came, and gave all Chauntries to the King, and there the word (Priviledg) was not in the Act; yet by those words the Lands were not discharged from the payment of Tythes: The Statute of 31 H. 8. is, Conditions and Rights of Entrie; yet there was another Act made to give Conditions to the King. But admit that the King himself be discharged, yet his Patentees are not discharged. The Priviledg was personal, and personal Priviledges are not transferrable. 35 H. 6. 56. A Statute dissolves the Templers, and gives the Lands to the Hospitalers to hold by the same service as the Templers did, which was *Frankalmoign*; yet the Grantee held by Fealty, for that *Frankalmoign* is a personal priviledg, and cannot be transferred by general words. The King (it's true) shall have the priviledg, for he is a priviledged person; for of his goods he shall not pay Tythes, if he do not grant them over: and the Grants prove, That unless he had granted them, he should have paid no Tythes. The Statute of 31 H. 8. sayes, All Conditions which the Abbots, &c. have; yet untill the Statute of 32 H. 8. no Purchasor could take advantage of a Condition. *Hill. 44. Eliz. in the Common Pleas, Rot. 1994. Spurlings Case.* The Purchasors of Lands of the Hospital of St Johns of Jerusalem, were not priviledged from the payment of Tythes. *Pasch. 8. Jacobi in the Common Pleas, Urry and Bomjers Case.* In a Prohibition it was holden by *Cook and Nichols*, That the Purchasor of St Johns of Jerusalem should pay Tythes; but *Winch and Warburton* cont. 18 Jacobi, in the Common Pleas, All the Judges but *Warburton*, held that the Purchasor should pay Tythes. 10 *Eliz. Dyer*, There it doth not appear whether they were of the Order of Templers or Cister-tians.

The third point in this Case, The Defendant doth make no title to the Discharge, for he hath not averred that the Priory were Ecclesiastical persons. If a man plead that A. is professed, the Court cannot take notice of it that he is a dead person in Law; But if he saith that he was of such an Order, he ought to set forth of what Rule the Order is. Secondly, The manner of their discharge was, when they did Till and sow their Lands, *proprieis sumptibus & manibus*. If they grub up Roots, and make the Lands fit for Tillage; but if their Tenants sow the Lands, they shall pay Tythes, for they had the priviledg in respect they should not be idle; unless all these do concur, they shall pay Tythes, *viz.* plough, sow, reap, and carrie the Corn. These Priviledges are to be taken strictly, because they are to defeat the Church of her endowment; and therefore in this Case the Defendant doth not well entitle himself to the Discharge, unless he do shew that he did occupie the Land for

for one whole year before, and that he did plow, sow, and reap the corn; But he ought for to have shewed, that such time he plowed the Land, such a time he sowed it, and such a time he reaped the corn; Otherwise the Court will intend that another man did plow and sow the land, and that he only reaped it: For if Lessee of the Hospital doth plow the Land, and sow it, and afterwards doth surrender to the Prior of the Hospital who reaps the same, he shall pay Tythe of the same, for the Priviledge was granted unto them who were Labourers. And the Defendant perhaps might have the Lands to halves: that is to say, to have half the Corn growing upon the Lands. The pleading is not good. When you plead two Bars, each Bar must stand of it self, and the surplusage of the one Bar shall not help the defect of the other Bar. The word (*Priviledge*) in the Act of 32 H. 8. doth not extend to Tythes: If it doth, yet the Purchasor shall not have the Priviledge. *Dodderidge Justice*, The Statute of 32 H. 8. was made, because that those of *S. Johns of Jerusalem* said, that they could not surrender their Hospital, because they had a Supreme Head over them, viz. their great Master the Pope.

Crawley Serjeant argued for *Weston* the Defendant. The pleading was over-ruled to be good, the last day the Case was argued. We have well entitled our selves to the Discharge: For we have pleaded that we had the occupation of the Lands for one whole year; and that *Weston* the Defendant plowed, sowed, and reaped the Corn upon the lands at his own costs and charges; And the Plaintiff hath not shewed that any other plowed, sowed, or reaped the same. Our title is by prescription, which is confessed. This Society was erected in the time of King *Henry* the 1. and it continued untill 32 H. 8. 44 *Eliz.* in *Spurlings* case, there were two reasons of the Judgment. 1. There the Statute of 31 H. 8. was not found, and so the King was not entitled to rights and priviledges, and by consequence so was not his Patternee. 2. It did not appear that the Council of *Lateran* (15 *Johannis*) did extend to these Orders, which was said to have been created 17 E. 3. whereas indeed it was created in the time of *Henry* the 1. Regularly this priviledge is not transferrable, for it is *ratione Ordinis*: As when the King makes a Duke, and gives to him possessions, those possessions annexed to the Dukedom are not transferrable over but by special Act of Parliament. 35 H. 6. 35. *Moile*, There if there had been special words in the Act of Parliament, it had been *Frankalmoigne*. This Priviledge is transferred to the King by the Act of 32 H. 8. and that Statute requires no aid of Regular or Ecclesiastical persons. Secondly, the words are special, *And all other things of theirs*. This Case opposeth not the Bishop of *Canterbury's* Case, C. 2 part; For that refers to the Statute of 1 E. 6. which had not so large words. The intent of an Act shall be taken largely and beneficially to enlarge the Kings possessions; as the grants of the King shall.

shall be taken largely and beneficially for the King. There is a difference betwixt this Statute of 32 H. 8. and the Statute of 27 H. 8. The copulative words of the Statute of 27 H. 8. are, *To have all Rights and Interests, and Hereditaments. C. 11. part 13. pro omnibus demandis, &c.* there the demand shall extend to Temporal demand; so, All rights and Interest, and Inheritance, shall be construed, All temporal rights; &c. But the Statute of 32 H. 8. is larger, viz. *Of what name and nature soever.*

If by the words of the Statute of 31 H. 8. (*Priviledges*) Tythes had been given to the King without especial provision after made, then what needed the special Clause after? was the Objection which hath been made. I answer, The special Clause was necessary: For in pleading otherwise he ought to have shewed what Priviledge and Discharge it was in particular; and so the Clause was added for the ease of pleading. C. 9. part, The Abbot of *Straza Mercellos* case; there it is said, That if a man plead to have such priviledges as such a one had, he ought to shew in particular what those priviledges were: But this provision in the Statute of 31 H. 8. was made for the benefit of pleading. The Statute of 17 E. 2. which gave the Tythes to the Hospitallers, gave them by the word of Priviledges, for they had their possessions as it were by a new purchase. *Cook Entries* 450. there the Case much differs from this: so then the general word (*Priviledges*) doth extend to Tythes. 14 H. 8. 2. By a grant of All trees, Apple-trees will not pass; yet if it be of all trees *cujuscunque generis, natura, nominis aut qualitatis*, then they will pass. C. 3. part 8 f. By grant of all goods, Apparel will not pass. Here are special words in the Statute, *cujuscunque natura, nominis, &c. Nomina sunt symbola rerum*: And then call them what you will they are given to the King, and intended to be transferred to the King; and so there needs no special provision for the discharge of the Tythes; For to say, that the Priory was of the Order of the *Cisterrians*, is sufficient.

Admit then that the King shall have the Tythes, as I have argued he shall; then his Pattentee shall have them. It is a real discharge in the King, and not a discharge in respect of his person only. Priviledges of discharge may be transferred as well as Priviledges of profit. Then the question further is, Whether they of *S. Johns of Jerusalem* were Ecclesiastical? They were Regular, as appeareth by the Statute of 32 H. 8. for that saith that they shall be free from Obedience. *Trin. 8 Jacobi* in the Common-Pleas, *Bonyers* case: *Whores Cook, Nichols, Warburton* and *Winch* did agree that they were Ecclesiastical Priests. The Prior had Parsonages; and none could have Parsonages but Ecclesiastical persons. 3 E. 3. 11. They had Appropriations, which could not be unto Lay-men. 22 E. 4. 42. There a Writ of Annuity was brought against the Prior of *S. Johns of Jerusalem*; and it was ruled there that he ought to be named Parson, which proves that he was Ecclesiastical. 26 H. 8. cap. 1. there it

is said, That he shall pay First-fruits as other Parsons; which proves that he was Parson. 42 E.3.22. there they are called Ecclesiastical. 35 H.6.56. they were seised in the right of the Church. *Linwood lib.2. cap. 47. de Judiciis*. That they were Ecclesiastical. It was objected, that Knight-hood cannot be given to Ecclesiastical persons; and they were Knights. Popham once Chief Justice of this Court said, That he had seen a Commission directed unto a Bishop to Knight all the Parsons within his Diocese; and that was the cause that they were called Sir John, Sir Thomas; and so they continued to be called untill the Reign of Queen Elizabeth. Jones and Dodderidge Justices, They were Ecclesiastical persons, although they were divided from the jurisdiction of the Bishop. The Case was adjourned to be further argued.

Pasch. 3 Caroli, in the Kings Bench.

479. LANGLEY and STOTE's Case.

IN an *Ejectione firme*, the Plaintiff declared of an Ejectment 26 Martii 23 Jacobi, contra pacem dicti Domini Regis nunc: which could not be, because King James dyed the 27 of March, and so it was not contra pacem Caroli Regis. 8 H.4.21. An Appeal of Mabeim was brought; and the Plaintiff declared, That he meyhemed in the time of the King that now is; and the Writ did suppose the same to be in the time of King R. 2. And for that cause it was adjudged, *Quod nihil capias per Breve*.

Pasch. 3 Caroli, in the Kings Bench.

480. MULLE and DOE's Case.

DEbt was brought upon a Bond; and the Plaintiff in his Declaration doth not say, *hic in Curia prolar*. It was holden by the Court, That although it be in the election of the Defendant to demand *Oyer* of it, yet the Plaintiff ought to shew it. The Judgment also was entred, *Concessum est*; whereas it ought to have been, *Ideo consideratum est*. And for these causes the Judgment was reversed: So was it adjudged also the same Term in this Court, in *Barrers and Wheeler's Case*.

Pasch.

Pasch. 3 Caroli, in the Kings Bench.

481. Serjeant Hoskin's Case.

HE was Indicted for not paving of the Kings high-way in the County of *Middlesex* in *S. Johns street, ante tenementa sua*: And in the Indictment it was not shewed, How he came chargeable to pay the same; Nor was it shewed that he was seised of any house there, nor that he dwelt there, nor was it averred that he had any Tenement there. The opinion of the Court was, that the Indictment was uncertain; for it might be that his Lessee dwelt in the house, and so the Lessee ought to have repaired it, and also mended the high-way. And for these Incertainties the Indictment was quashed.

Pasch. 3 Caroli, in the Kings Bench.

482. SAMSON and GATEFIELD's Case.

ERror was brought to reverse a Judgment given in the Court of *Virgo* in an Action upon the Case; where the original Process *fuit* a *Sommons*, whereas it ought to have been an Attachment.

Pasch. 3 Caroli, in the Kings Bench.

483. HERN and STUB's Case.

IN an Action of Detinue, the Plaintiff did declare upon the Bailment of a Cloak of the value of 10^l. to the Defendant to be safely kept, and to be redelivered unto him upon request: And shewed, That he did request the Defendant to redeliver it, and that yet he doth detain it to his damage, &c. The Defendant justified the Detainer by reason of a Forain Attachment in *London*: And said, That *London* is an ancient City; and that there is a Custom in *London* &c. That if any one be indebted unto another, that if he will enter his suit or plaint into the Counter

Counter of the Sheriff of *London*, that a Precept shall be awarded unto a Sergeant at *Mace* to summon the Defendant; and if he return *Nihil*, viz. that he hath nothing within the City by which he may be summoned, and *Non est inventus*; And if he be solemnly called at the next Court, and makes default, that then if he can shew that the Defendant hath goods in the hands of one within the Liberty of the City, that the said goods shall be attached: And if the Defendant make default at four Court-dayes, being solemnly called, that then if the Plaintiff will swear his Debt, and put in Bail for the goods, viz. That if the Debt be disproved within one year and a day, or the Judgment be reversed, That he shall have Judgment for the said goods. And he shewed, That he entred his plaint against the now Plaintiff in the Counter of *Woodstreet* for the Debt of 20*l*. and that a Precept was awarded to a Sergeant at *Mace* to summon him; And because he had not any thing by which he could be summoned, he shewed that the now Plaintiff had goods in his the Defendants hands, which were attached in his hands: And that he sware his Debt, and put in bail for the goods, and had Judgment thereupon. Upon which Plea the Plaintiff did demur in Law.

Ward argued for the Plaintiff. There are four Reasons of the Demurrer. 1. He sets forth, That *J. S.* did levy a plaint against the now Plaintiff for the Debt of 20*l*. but doth not set forth expressly that he did owe him 20*l*. And he ought to have set down how the Debt grew due; for that is traversable by the Plaintiff, and now hee cannot traverse it. *C. 10. part 77.* The generall Count in an Action upon the Case, *Quod cum indebitatus fuit* in such a summe, *Super se Assumpsit*, without shewing the Cause of the Debt is insufficient. § *H. 7. 1.* Trespass was brought for taking of a Chain of Gold; The Defendant said, That the Plaintiff before the trespass supposed did License him to take the same Chain, and to retain it untill he paid him 200 Marks, which he ought to pay him. *Keble* took Exception, because the Defendant did not alledge for what cause the 200 Marks was due, which Cause the Plaintiff might traverse: to which *Brian acc.* 9 *E. 4. 41.* Trespass for taking a Bagge with Money; the Defendant said, That the Plaintiff was indebted unto him in a certain Summ, and delivered unto him the Bagge of Money in satisfaction. *Littleton*, The plea is not good, for he ought to shew how he was indebted unto him. *Old Entries* 155, 156. there in a Forraign Attachment the certainty of the Debt was expressed and averred. 2. He pleads a Custom, and doth not prosecute his Case according to Custom. The Custom is, That if the Sergeant return, that he hath nothing within the City whereby he may be summoned; And *Non est inventus*. And at the next Court day he be solemnly demanded, and make default, &c. And he saith, That because he had nothing by which he could bee summoned; but doth not say, That the Officer did return that he had not any thing whereby to be summoned, nor that he was not to be found,

nor doth he plead or say, That at the next Court day he was solemnly demanded. *Dyer* 196. b. where this Case of Foreign Attachment was; there the Custom is set forth, viz. That the Debt ought to be affirmed by the Oath of the party in *Curia Guildhall*; and this was pleaded to be in *Curia Vicecomitis in Computatorio*. Also he doth not averr, That he had found pledges according to the Custom, and therefore the plea is insufficient, because he hath not pursued the Custom. 3. He sheweth that the goods were attached in the Defendants hands, but he doth not shew that it was within the Liberty of the City and it might be out of the liberty of the City, and all the Presidents are *infra jurisdictionem* &c. And the Plea of every person shall be taken strongest against the Pleader. And he ought to have shewed that it was within the Liberty of the City, because it is a peculiar Jurisdiction. 34 E. 3. breve 789. Debt was brought in the Common Pleas; the Defendant said, That the Plaintiff had a Bill for the same Debt depending in the Exchequer; and demanded Judgment of the Writ, & *non allocatur*: for it doth not appear by the Plea that the Plaintiff or Defendant were privileged in the Exchequer, and then by the Statute of *Articuli super Chartas*, cap. 4. it is provided, That no Common plea shall be holden in the Exchequer. 4 E. 4 36. a. In trespass for Imprisonment, the Defendant doth justifie, &c. there he ought to shew that the Tower of London hath privileges &c. For where a man will take advantage of a particular Privilege and Liberty, he ought to shew that he was within the Privilege or Liberty. *Mis. 2 Car. Willis* was Indicted before the Justices of Northampton for frequenting of a Bawdy-house in Northampton; and the Indictment was quashed, for it might be within Northampton, and yet out of the Liberties and Jurisdiction of Northampton. 4. He doth not shew in his Plea that his Debt was a due Debt: and it was pleaded in *Dyer* 196. that it was a due Debt, *vi. Entries* 155, 156. It is not enough to swear his Debt, but he must swear his Debt to be a due Debt.

Stone for the Defendant. 1. I agree, that if the Action had been brought in that Court to recover a Debt, then he ought to set forth how it became due: but here he pleads to bar him, and not to recover, and so the Debt is not traversable. 5 H. 7. 1. there *Brian* took the Exception; but two Judges are against him, because he brought not Debt, but another Action for the Chain. 9 E. 4. 41. It is good by *Moile*, without shewing the Debt, because it is by way of excuse. 39 H. 6. 9. is ruled in the point: there the Attachment is in his own hands; there the other pleaded there was no debt: It is there ruled, that the debt is not traversable; for if there be no debt, then he shall have restitution in London upon the pledges. It was objected, That he is to swear his debt to be a true debt. I answer, It ought to be so intended; and then if he lay a Custom to swear the Debt, and we say we have sworn our Debt, then we have pursued the Custom. 3. It was objected, that it

is not shewed where the goods were, whether within the jurisdiction of the City. 4 E. 4. 36. there the place came not in question: But in our Case we lay, That the Custom is, that the goods must be in London. *Old Entries*, 155, 156. there it is not alleadged that the goods were within the City of London at the time of the Attachment. If a Precept be awarded to the Officer, who returns that he hath not any thing within the City; and upon the allegation of the Plaintiff that such a one hath goods of the Defendant in his hands, was the Objection. I answer, If we have not proceeded well, yet the Process is well enough; for here is a Judgment against him in London: then so long as the Judgment is in force against him, he cannot have the goods. 21 E. 4. 23. It is a Rule, That a stranger unto a plaint shall not be received to alledge discontinuance in the process: So the Sheriff shall not excuse himself upon an Escape, that there was Error in the Judgment, nor a privy shall not take advantage of it. *Ognels Case Trin. 31 Eliz.* there lies no process of *Capias* by the Law upon a Recognisance, but *Exigent*, or *Levari facias*: Yet there a *Capias* was awarded; and if the party taken escape, the Sheriff shall not take advantage of the Erronious process. So I desire Judgment for the Defendant. And he took an Exception to the Declaration: In Detinue, if the Declaration be general, it is good, (*sc.*) *Licet sepius requisitus &c.* But here he shews that he delivered the Cloak to be redelivered upon Request, and he doth not shew any particular Request, but sayes generally *Licet sepius requisitus*. *Ward*, There is a difference betwixt Detinue, and Action upon the Case: For in an Action upon the Case he ought to shew a particular Request. 26 H. 6. If I bail goods to redeliver upon request, yet I may seise them without request. *Dodderidge Justice*, The rescisure of the goods is a Request in Law, a Request with a witness, a Request with effect; and untill Request, he hath just cause to keep them. *Jones Justice*, In Debt and Detinue the very bringing of the Action and demand of the Writ is a demand and request: And if he appear at the first Summons, then he excuses himself, otherwise he shall be subject to damages: but the Request ought not to be so precisely alleadged. But if a collateral thing be to be done upon Request, there to say *sepius requisitus* is not sufficient. So if I sell a horse for 10^l. to be paid upon Request, there the Request must be precisely laid, for it is parcel of the Contract: And in Action upon the Case, and upon Debt, you must lay a Request. *Dodderidge Justice*, The Request is no part of the Debt; for the Debt is presently due; but if I make the Request to be part of the Contract, there it is otherwise: As if I deliver goods to redeliver to me, there needeth no precise Request: but if it be to redeliver upon Request, there the Request ought to be alleadged, for there the Request is part of the Contract. The Case was adjourned till the next Term.

Pasch. 3 Caroli, in the Kings Bench.

484.

MOLE and CARTER's Case.

IN an Action upon the Case upon an Assumpsit, it was moved in arrest of Judgment, That the Plaintiff declares that he was possessed of certain Goods (*viz.* such, &c.) at *London*, And that in consideration of two shillings, That the Defendant at *London* did promise to carrie the said Goods aboard such a Ship, if the Plaintiff would deliver the Goods to him; And he shewed that he did deliver the Goods to him; and that he had not carried them aboard. He shewed that he was possessed of the Goods, but did not shew when or where he delivered the said Goods to the Defendant; but said only *deliberavit, &c.* And then the Law saith that they were not delivered. *pones Justice*, The same is but matter of Inducement to the promise, and ought not to be shewed so precisely.

Pasch. 3 Caroli, in the Kings Bench.

485.

FRYER and DEW's Case.

DEW being sued, prayed his Priviledg, because he is a Commoner in *Exeter Colledg in Oxford*, and brought Letters under the Seal of the Chancellor of *Oxford*, certifying their Priviledg: and he certifies that *Dew* is a Commoner, as appeareth by the Certificate of Doctor *Prideaux*, Rector of the said Colledg, Whereas he ought to certify that he is a Commoner upon his own knowledg, and not upon the Certificate of another. But afterwards Certificate was made of his own knowledg, and then it was allowed as good. The Declaration came in *Hill. 2 Caroli*. The Certificate bore date in the *Vacation*, and he prayed his Priviledg this *Easter Term*. After *Impar lance* he comes too late to pray his Priviledg: The Certificate is not, that at the time of the Action brought he was a Commoner in *Exeter Colledg*, but that now he is a Commoner. And the Certificate bears date after the Action brought; He ought to have said that at the time of the Action brought, and now he is a Commoner in *Exeter Colledg*. The Priviledg was allowed *per Curiam*. *Trin.*

Trin. 21 Jacobi, in the Kings Bench.

486.

TANFIELD and HIRON's Case.

THE Plaintiff brought an Action upon the Case against the Defendant, for delivering of a scandalous Writing to the Prince, and in his Declaration he set forth what place he held in the Commonwealth, and that the Defendant seeking to extenuate and draw the love and favour of the King, Prince, and Subjects from him, did complain that the Plaintiff did much oppress the Inhabitants of *Michel Tne* in the County of *Oxford*, and that he did cause Meerstones to be digged up, which might be a cause of great contention amongst the Inhabitants of *Tne*. The Plaintiffe denied the oppression alledged against him; and the Defendant did justifie, and said that *I. S.* being seised of the Mannor of *Tne*, did demise certain Lands, parcel thereof unto *I. F.* for eighty years; who made a Lease of the same at Will; and afterwards *I. S.* did Enfeoff *Tanfield* the Plaintiff of the said Mannor, to whom the Tenants did attorn Tenants: And the Defendant shewed, That time out of mind, the Inhabitants of the Town of *Tne* had Common in the Waste of the said Mannor, and that a great part of the said Mannor was inclosed, and the Meerstones removed (but doth not shew by whom:) And shewed that the Lands inclosed, out of which the Inhabitants had their Common. And said, That there were divers other Grievances to the Inhabitants of *Tne*, (but did not shew by whom they were, nor what they were) and shewed, that at a Parliament the Defendant did deliver such a Writing to the Prince, as one of the Peers of Parliament, supposing that the grievances were set upon the Inhabitants by the Plaintiff, by reason the Plaintiff occupied the Lands so inclosed; and for Reformation thereof, that he delivered the Writing to the Prince *Abque hoc*, that he did deliver it in any other manner. And upon this Plea in Barr, *Tanfield* the Plaintiff did demurr in Law.

Nay for the Plaintiff said, That the Defendant complains of wrong, and doth not shew any wrong to be done by *Tanfield* the Plaintiff; It is a grievous scandal to deliver this Writing; for it is a scandalous Writing; and no Petition: for therein he doth not desire any Reformation, but complains generally. Betwixt *John Frisfel* and the Bishop of *Norwich*, The Case touched in 21 E. 3. was, That *Frisfel* brought a Prohibition to

the Bishop, and the Bishop excommunicated him for the delivering of it unto him; The Bishop was fined: And there it is said, As Reverence is due to the King, so it is due to his Ministers. Our Action is brought at the Common Law, and not upon the Statute of *R. 2. de scandalis magnatum. M. 18 E. 3. Rot. 102*, Thomas Badbrook sent a Letter to Ferris, one of the Kings Council, the effect of which was, That Scot Chief Justice of the Kings Bench, and his Companions of the same Bench, would not do a vain thing at the Command of the King; yet because he sent such a Letter to the Kings Council, although he spake no ill, yet because it might incense the King against the Judges, he was punished, for it might be a means to make the King against his Judges. We are to see here, if the Defendant hath made any good Justification; If there were no wrong, then there was no cause to complain. Secondly, If he had demeaned himself as he ought, he ought to have had the wrong (if there were any) reformed, and that he did not do. *11 H. 4. 5 H. 7.* A voice of Fame is a good cause for to Arrest a man of Felony; but then some Felony ought to be committed. *7 H. 4. 35.* A certain person came and said to one, that there were certain Oxen stoln, and that he did suspect such a one who he arrested upon the suspicion: It is a good cause of Justification if any Oxen were stoln; but if no Felony was committed, if one be arrested upon suspicion that he hath committed Felony, it is not good: If Felony be done, then a good cause to suspect him; but if no Felony be done, nor he knoweth nor heareth of any Felony committed, there is no cause for to suspect that the partie hath committed Felony; but there ought to be suspicion that the partie hath committed such a particular Felony: Where Felony is committed certainly, one may be arrested upon suspicion, but unless a Felony be committed he cannot be arrested: For where no Felony is committed at all, he shall not be drawn to a Tryal to clear himself of the suspicion; but if a Felony be certainly committed, and he be arrested upon the suspicion, there he being forced to answer to the Felony, he may clear and purge himself of the infamy upon his tryal, and so the infamy is not permanent, as in case when no Felony is committed; for there he may bring his Action upon the Case. Here he saith that parcel of the Waste is inclosed, and doth not shew what parcel, so as no certain issue can be taken upon it. *Moor and Hawkins Case in an Ejectione firme*, It was alledged that he entred into parcel of the Land, and the Land was alledged to lie in two severall Towns; and it was not good, because no certain issue could be thereupon. He saith the same was inclosed, but doth not shew by whom it was inclosed, *viz.* whether by the Feoffor, or *Tanfield* the Feoffee: he complains of many grievances, but doth not shew what they are, and he ought not to be his own Judge.

Secondly,

Secondly, He hath not demeaned himself as he ought; for he hath not desired in the Letter any Reformation, but only he complains of the oppression of *Tanfield*: He ought to have directed the Writing unto the Parliament, and he directed the same unto the Prince by name; In the Letter he doth not shew that *Tanfield* the Plaintiff did oppress, but that the Plaintiff was an oppressor, but he doth not shew in what thing. The Case was adjourned.

Trin. 21 Jacobi in the Kings Bench.

487.

Scot's Case.

P*Roborum & legalium hominum* is omitted in the Certificate of an Indictment by the Clerk of the Sessions: *Curia*, If it had been in Trespass, the omission of the said words had vitiated the Indictment; but not in Case of Felony. *Quare* the reason.

Trin. 21 Jacobi, in the Kings Bench.

Intratur, M. 19 Jac. Rot. 322.

488.

CROUCH and HAYNE's Case.

In a Writ of Error the Record is removed out of the Common Pleas: The Defendant pleads *in nullo est Erratum*, and a Demurrer is joyned; and the Defendant afterwards alledgeth Diminution of the Original. 7 E. 4. 25. The Assignment of Errors is in lieu of the Declaration. 4 E. 4. Error 44. After that *in nullo est erratum* is pleaded, the Defendant shall not alledg Diminution; for they are agreed before, that that is the Record. The Writ of Error was general, and did not shew when the

the Judgment was, when the Ejectment was, what the Lands were; and nothing is certain in the Writ of Error, but the persons and the Action: He shall not be concluded by the general return of the Record by the Chief Judge of the Common Pleas. *Fitz. 25. a. C. 6. Entr. 231.* The Record was removed, and a *Scire facias* awarded *ex recorde*; and Diminution was alledged for omitting of certain words; yet the Return there was of the Record, & *omnia ea tangencia.* *Dyer 330.* The Court certifie that the partie was not essoigned; there then cannot be any Certificate of the Chief Justice to the contrary. The Principal Case was, An Original bore date in *June 18 Jacobi*, and another Original in *September 18 Jacobi*, and both were returnable *S. Mich.* And the Trespass was done after the first Original sued forth, and before the later, and both the Writs are in Court: The question was, upon which of the Originals the Judges should judge. *4 E. 4. 26, 27, 28.* There it is holden that the Judges ought not to suppose any Error. *22 E. 4. 45:* Error was brought to reverse a Judgment in a Writ of Dower, And the Error assigned was, That there was not any Issue joyned; but because there was sufficient matter upon which the Judges might give their verdict, therefore the Judgment was affirmed: for the Judgment was not given upon the verdict. *Pasch. 25 H. 8. Rot. 25. Plor and his wife against Treventry* in a Writ of Error, after the Record removed, Diminution of the Original was alledged; and there it was pretended that the Judgment was given upon another Original, and one of the Originals was before, and the other after the Judgment; and there the Judgment was reversed, because it cannot appear to the contrary but that the Judgment was given upon the later Original. *Trin. 18 Jacobi, Rot. 1613.* *Bowen and Jones's Case*, In an Action upon the Case brought upon *Assumpsit*, Error assigned was, because that no place was limited where the payment should be made: The Original was, That the promise was in consideration that the Plaintiff did lend to the Defendant so much, he at *London* did promise to pay the same to him again; There were two Originals which bore date the same day, Judgment was in that Case for the Plaintiff: And the Defendant brought a Writ of Error, and alledged Diminution of the Original, then the other Original was certified; The Defendant in the Writ of Error said, That the Original upon which the Recoverie was grounded, was an Original which had a place certain; The Judges did affirm the same to be the true Original which did maintain the Judgment, and agree with the proceedings, otherwise great mischief would follow. *George Crook* contrarie, and re-iterated the Case, *viz. Hayns* brought a Writ of Error against *Crouch*, and the Writ of Error is to reverse a Record upon a Judgment which was given in the Common Pleas; The Original which is certified, bears date *Trin. 18 Jacobi*; and the *Ejectione firme* is brought *Trin. 18 Jacobi*, for

for an Ejectment which is made in *September* following; and now upon this Error assigned, the partie had a *Certiorari* to remove the Record upon which you alledge Diminution: For you say, That the Originall upon which the Judgment was given, bore date in *September* 18. *Jacobi*, which was after the Ejectment. The bodie of the Record is *Trin.* 18. Contrary to this Record, you say that there was an Originall *Mich.* 18 *Jacobi*, and so that is contrary to the Record. Error 2. upon the Record, The Originall is not part of the Record; but you ought to assigne Error in that which is alledged in Diminution. 6 H. 7. 4 Fitz. 21 a. To alledge any thing against a Record, is void: The Ejectment was after the Originall which warrants the Record, and it was after the Action brought. They alledge that the Originall was not truly certified, and that then after an *Imparlance*, an Originall Writ is made to Warrant the Action, *Jones* and *Bowens* Case before cited. There a vitious Originall was certified, and then upon the Complaint of the Defendant, the true Originall was certified; both were retornable at the same day.

And in the Case before cited of *Plott* and *Treventris*, The Originall which was first certified did not bear date according to the Record which was certified: But in our Case the last Originall doth not agree with the Record, but the first. But in the Case of *Plott* the Judgement was reversed for another Error. The Diminution when it stands with the Record shall be allowed, but when it differs from the Record, then it shall not be allowed.

The Ejectment was layed after the first Originall purchased, which agrees with the Record, and after the Action brought. *Quod nota.* It was adjourned till another Terme, viz. *Mich.* 21. *Jacobi.*

Ggg

Trin.

Trin. 21. Jacobi in the Kings Bench.

489.

SOMMERS'S Case.

THe Case was between *Sommers* and *Mary* his Wife Plaintiffs; who Traversed an Office found after the death of one *Roberts*: The parties were at Issue upon one point in the Traverse; and it was found against the King's *Heads* Serjeant moved: The Office finds, That *Roberts* dyed seised of two Acres in Socage, and four foot of Lands holden in *Capite*: (which was alleged *Roberts* had by Encroachment.) *Sommers* and his Wife pleaded, That *Roberts* in his life-time did enfeoffe them of one of the Acres, *Absque hoc* that that Acre did descend. And for the other Acre they pleaded and entitled themselves by the Will of *Roberts*, *Absque hoc* that *Roberts* was seised thereof. That I take to be an insufficient Traverse.

First, it is found by the Office, That *Roberts* dyed seised, and that the same descended to four Daughters, and One of the Daughters is the Wife of *Sommers*: And he and his Wife traverse the Office, and confesse that the Antecessor died seised, *Absque hoc* that the same descended: The Traverse is repugnant in it self, for if he did Devise it, then untill Entry by the Devisee it doth descend: but if they had pleaded the Devise only, and Entry by force thereof, it might have been a good Traverse. The Office findes that it did descend to four Daughters, and the Wife of *Sommers* is one of the four Daughters, and he and his Wife Traverse the descent, and that is not good, for one cannot Traverse that which makes a Title to himself. 37 *Aff.* 1. The Rule there put is; That a Man cannot Traverse the Office by which he is intitled; but in point of Tenure he may Traverse it: wherewith agrees *Stamford Prerogat.* 61, & 62. 42 *Aff.* 23. One came and Traversed an Office, and thereby it appeared that Two there had occasion to Traverse it, and it was holden that, they all ought to joine in the Traverse. *Finch Recorder of London, contr.* The Office found generally, That *Roberts* had four Daughters, and had two Acres and four Foot of Lands, and that the same descended to four Daughters: *Sommers* and his Wife Traverse the Office, and plead, That as to
one

one Acre; *Roberts* made a Feoffment thereof unto them; *Abſque hoc* that he died ſeiſed thereof. 2. That *Roberts* deviſed the other Acre to them *Abſque hoc* that the ſame did diſcend. *Eliz. Dyer 221: Biſhops Caſe*, There it is reſolved, That a Devife doth prevent a Remitter; and then by conſequent, it ſhall prevent a Diſcent. 49 E. 3. 16. There a Devife did prevent an Eſcheat to the King.

As to the four Foot (gained by Encroachment) which is holden of the King in *Capite*, They traaverse *Abſque hoc* that *Roberts* was ſeiſed thereof; I agree that where their Title is joyned, there all muſt Traaverse; but in our Caſe we Traaverse for our ſelves, and deny any thing to be due to the three other Siſters.

The four Foot of Waſte, was part of the Mannor of *Bayhall*, and the *Venire facias* was out of that Mannor, and the Towns where the other lands lay. 9 E. 4. *A. diſſeiſes B. of a Mannor, and A. ſevers the Demeſnes from the Services*: Now *B.* ſhall demand the Mannor as in Truth it now is: *Henden contr'*. It is no part of the Mannor of *Bayhall*, for it is encroached out of it; therefore the *Venire facias* ought not to be of the Mannor of *Bayhall*. The Jury finde that he had encroached four Foot *Ex vaſto Manerii, &c.* *Dodderidge Juſtice*, the encroachment doth not make it to be no parcell of the Mannor. *Ley chief Juſtice*, it is not layed to be a Diſſeiſin, but an Encroachment, and therefore it is not ſo ſtrong as a Diſſeiſin with a Diſcent, but in Right it belongs to the Mannor: Tenant in Tail makes a Feoffment to the uſe of himſelf, and deviſeth the Lands to *A.* the Devife doth prevent the Remitter.

Haughton Juſtice the Diſcent is Traverſed: The Father dieth ſeiſed, and hath iſſue two Sons; and that the Lands diſcended to him; the other may ſay, That the Land is borough Engliſh, and that the Lands diſcend unto him *Abſque hoc* that they diſcended to the Eldeſt.

Dodderidge Juſtice, Regularly, you ſhall not Traaverse the Diſcent but by the dying ſeiſed; but in this Caſe it ought to be of neceſſity (*ſc.* in caſe of a Devife, the Traaverse muſt be of the Diſcent; for here they cannot traaverse the dying ſeiſed, for if they traaverse the dying ſeiſed, then they overthrow their own Title, *ſc.* the Devife; but here in Caſe of a Will, the partie ſhall traaverse the Diſcent; for he cannot ſay that it is true that the Lands did diſcend; and that he Deviſed it, &c. The heir cannot traaverse that which entitles him by Diſcent; but here his Title is by the Devife, and not as heir. *Finch Recorder*, the Devife is not of the four Foot; for if we confeſs the dying ſeiſed of the four Foot which was

was holden in *Capite*, then we should overthrow our own Devise. The Office finds that he died seised of the whole, and therefore of the four foot. He being never seised, we traverse the dying seised thereof, and we deny that he ever had it; so the Traverse is good without making of us any Title unto it, for we desire not to have it. *Dodderidge* Justice, If a man deviseth to his heir, it is a void Devise; for the discent shall be preferred: But if one hath Issue four daughters, and he deviseth to one of them, it is good for the whole Land so devised to her; and no part of the Land so devised shall discent to the other, the Lands being holden in Socage. *Lev* Chief Justice and the whole Court did agree, That they might deny and traverse the four Foot, if the Ancestor had no Title unto it: and Judgment was given accordingly against the King, *quod nota*:

Trin. 21 Jac. in the Kings Bench.

490. PAYNE AND COLLEDGES Case.

AN Agreement was made between *Payne* and *Colledg*, That if *Payne* (being *Chirurgion*) did Cure *Colledg* of a great Disease, viz. A *Noli me tangere*, That then he should have 10*l.* and that if he did not cure him, That then for his pains and endeavours, *Colledg* would give him 5*l.* In an Action upon the Case brought by *Payne*, he doth not shew in his Declaration in what place he used his endeavour and Industry: And there is a difference where the Plaintiff is to do any thing of Skill and Industry, for there he may do the same at several times, and in several places; and so this Case differs from the Cases in our books. 15 *H. 6. Accord*: 1. is expressly in the point, There the Defendant pleaded an Accord, That if the Defendant by his Industry, &c. And exception was taken because that he did not shew a place. 3 *E. 4. 1.* Debt brought by a Servant, and declares that he was retained by the predecessor of the Defendant, &c. and that he had performed his Service, &c. It was moved in Arrest of Judgment, and Exception taken as in our Case, because he did not shew where he did the Service, for that is issuable: and *Denly* there said, That he need not shew the place, because he might do it in several places. *Bridgeman* Serjeant contrarie, If the issue had been upon a Collateral matter, it had been good

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good enough ; but here the issue is taken upon an endeavour , and you ought to alleadg a place for the tryal of it. *Dodderidge* Justice, The Jury was from the place where the Agreement was made, the verdict will not make good the Declaration, although the Jury have found the whole matter of fact ; for it doth not appear to us, That that was the Jury which could try his endeavour. The Case of 3 E. 4. of the Servant was to serve him seaven years, and there he need not shew any place where he did his Service, but only that he obeyed his Master in his Service for the seaven years : If the Plaintiff in this Case had shewed but any one place of doing his endeavour in it, had been sufficient ; but here he sheweth no place at all : And therefore Judgment was given, That *Querens nihil Capiat per Billam.*

Trin. 21 Jacobi, in the Kings Bench.

491. The Lord Zouch and Moores Case.

IN an Action of Trespas for cutting down of Trees in *Odiham* Park in *Hampshire*, It was found by special Verdict, That King *Henry* the eighth was seised of the Mannor and Park of *Odiham*, And by his Letters Patents 33 of his Reign, did grant unto *Genny* the Office of Stewardship of the said Mannor, and the Office of Parkership of the said Park, with reasonable Herbage ; and by the same Letters Patents did grant unto him the Mannor of *Odiham cum pertinaciis*, and 100. Loads of Wood, excepting the Park, the Deer, and the Wood, for fifty years, if he should so long live. Then they found, That after that *Genny* did surrender and restore the Letters Patents in the Chancery to be cancelled, and that in truth they were cancelled, and that the said Surrender was made to the intent to make a new Lease thereof unto *Pawlet* ; and that this Lease of 33 H. 8. being surrendered, That King *Henry* the 8. Anno 36. of his Reign, reciting the Letters Patents made to *Genny* to be dated anno 32 H. 8. (whereas in truth they were dated 33 H. 8.) and that they were surrendered, and that the intent of the Surrender was to make a new Lease to *Pawlet* ; Did grant the same to *Pawlet*, as before they were granted to *Genny*, excepting as before. They

They further found, That King *Philip* and Queen *Mary*, 5 & 6 of their Reigns, being seised of the said Mannor and Park in *jure Corona*, reciting that *Henry* the 8. anno 36 of his Reign had granted unto *Pawlet* as before, (omitting the *Proviso* which was for 50 years if he should so long live) and the Exceptions before; And reciting that those Letters-Patents were surrendered *as intentione* to make a new Lease *in forma sequente*. They in consideration of good service and 200*l.* paid did grant the Office as before, and by those Letters-Patents did grant Herbage generally (whereas the first Patent was reasonable Herbage) And by these Letters-Patents did grant to him the Mannor *cum pertinaciis* (except the grand trees and woods in the Park) and Felons goods which were granted by the first Letters Patents for 50 years: And here was a Rent reserved; and a *Proviso* that for doing of Waste that the Letters-Patents should be void: And there was no such *Proviso* in the first Letters-Patents.

27 *Eliz.* Queen *Elizabeth* reciting the Letters-Patents of 5 & 6 *Phil. & Mary* *verbatim* and truly, did grant the Parkership unto Secretary *Walsingham*, and Leased the Mannor unto him with the Appurtenances, with power to take 100 loads of wood, Excepting the Deer, *Habendum* from the end of the Lease to *Pawlet* either by surrender or forfeiture for 21 years rendring rent, and for not payment a Re-entry. *Walsingham* granted the same to *H.* who granted to the same to *Moor* and others Defendants. King *James* anno 1. of his Reign granted the said Mannor, and the Offices of Stewardship and Parkership all by one Letters-Patents to the Lord *Zouch*, who thereupon entred; *Moore* entred upon him and cut down the Trees; and the Lord *Zouch* brought the Action of Trespass.

Sir *Henry Yelverton* argued for the Plaintiff, and said, 1. The Lease made unto *Pawlet* 36 *H.8.* is a void Lease in Law. 2. The second Lease unto *Pawlet* made by King *Philip* and Queen *Mary* 5 & 6. is also void in Law. 3. The Lease made by Queen *Elizabeth* to *Walsingham*, anno 27 of her Reign, is also void in Law. And that the Lease made by King *James* is good in Law; and the Action of Trespass brought by him will well lie. The first Lease is void; For it is granted upon a false suggestion made by *Genny*, *scil.* a supposed Surrender: For the Lease which he did surrender did not bear date 32. but 33 *H.8.* and the Surrender to the King was false; for the Lease supposed to be surrendered by *Genny* beareth date 32 *H.8.* whereas there was no such Lease made to *Genny*: And therefore both being the suggestions of the party, the King was deceived;

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For what Lease *Genny* had, the King could not know but by the suggestion of *Genny*; and upon his information the King was contented to accept of a Surrender, which was but a shew of a Surrender. The King could not know with what *Genny* treated him, but by his Information; and in both the King was deceived: For it was not the Kings intent to charge the lands but with one Lease.

C. 6. part, The Lord *Shandoe's* Case; The reason of the Judgment there proves our Case: For there all which grew by the Information of the party was true, and then the King made a wrong Collection thereupon; but that which he collected was not upon the Information of the party. And there it was agreed, That if in any part the party had mis-informed the King, that the whole had been void. *Dyer* 352. Lessee for 60 years of the Queen made Lease for 80 years; The 60 years expire; the Assignee doth surrender unto the Queen his Lease for 80 years, *ea intentione* that the Queen shall make unto him a new Lease for 20 years. The Queen reciting that the said Lessee did surrender a Lease for 80 years, did grant to him a Lease for 20 years: The Lease for 20 years was adjudged void; For he did surrender no Lease unto the Queen. And there *Dyer* said, That it is all one where the Consideration is false, and where the Information is false; there, and here is but a shew of a surrender, And it was not the Queens intent to pass more then she took by the Surrender. *Henry* the 8. recites, That *Genny* hath surrendred up the Patent which bore date 32 H. 8. And there was not any such Patent. *Genny* suggested that he had given up the Patent, dated 32 H. 8. when he had not any such Patent. So the King was deceived in the suggestion.

A difference hath been taken betwixt Consideration and Information: Here the Consideration was Service, and Two hundred pounds paid; And it was objected, That he took here by the Consideration, and not by force of the Information. But I say that the Information was the ground upon which the Patent was made. For it was not the Kings intent to charge the lands with two leases. *C. 2. part* 17. there it is cited; That in a Patent of King *Henry* the 7. four Letters, *viz.* *H. R. F. H.* of the first words were left out, intending afterwards *propter honorem* to be set out with gold; but the great Seal was put to the Patent, leaving out the said four letters; and yet the Patent was adjudged good being referred to the Inrollment, Privy-seal &c. For thereby it appeareth that it was the grant of the King.

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If Queen *Elizabeth* recite, That whereas her Father made such a Lease, and doth not recite it by the name of *Henry* the 8. her Father, it is good enough, if *Henry* the 8. made such a Lease: But in such case, if *Henry* the 7. made the Lease, then the Lease of the Queen had not been good, for that she mistook her Ancestor, for *Henry* the 7. was her Grandfather. 10^o *H.* 7. 20. 20 *H.* 7. 7. 8. The Kings Patent may be without Date; for he may refer to the Inrolment and Privy-Seal, and so help it: But in such case if he doth surmise a false Date, the same makes the Patent void. 21 *E.* 4. 45. Misrecital of the year of the Reign of the King will make void a Patent: And in our Case, by the misrecital of the year of the King there is a year gained.

It was objected, That it shall be helped by the Statute of 34 *H.* 8. which helps Mis-recital, and Non-recital: But in our case it is not a Mis-recital: For Mis-recital is when part of that which is recited is true, and part false; but Non-recital is, when nothing at all is recited. But in our Case, it is a false Recital of the subject in the thing which is surrendered; *Genny* surrendred nothing, and the King took nothing.

Trin. 9 Jacobi, Roper and Roden's Cases. *Henry* the 8. reciting by his Grant, That where he had a Reversion expectant upon a Demise made unto *M.* whereas in truth it was made unto *N.* He granted the Reversion unto *Roden*. It was adjudged, That that recital was not helped by the Statute of 34 *H.* 8. for that the King had not any such Reversion. 19 *Jacobi, Tucker and Carr's Case* was adjudged upon the same point. *Doddington's Case*, *C. 2. part*, There a general Grant is not helped by the Statute of 34 *H.* 8. In our Case here is a mistaking of the thing it self: If he had recited the same to be 33 *H.* 8. and then had mistaken any thing in it, it had been helped by the Statute of 34 *H.* 8.

Dyer 195. *Kemp* was Nonsuit, (there 32 *H.* 8. was mistaken for 33 *H.* 8.) There the Surrender was of a Patent bearing date 32 *H.* 8. whereas in truth it bore date 33 *H.* 8. And there it is adjudged, That the Patent of 32 *H.* 8. cannot be the Patent of 33 *H.* 8. by which the Office was granted to him: And therefore it was adjudged void, notwithstanding the Act of 34 *H.* 8. and other Statutes of Misrecital. So in our Case 33 *H.* 8. is mistaken, and it is 32. whereas in truth it was 33 *H.* 8.

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The second Point then is, If the Lease of 36. H. 8. be void, then of necessity the Lease of 5. & 6. *Philip and Mary* is void, for therein is falsity of three things. 1. The thing recited is the custody of the Park, with reasonable Herbage, and the Patentee would have nothing but *premissa*, and he trusts the King to give that; and he takes from the Queen Herbage (leaving out reasonable) and so hee takes more then was intended him, and therefore hee hath deceived the Queen; and if you are to have reasonable Herbage; the King may put one to be Overseer, that you have that which is fitting and reasonable, and the Queen may agister Cattel there; but in our Case the Queen can neither yet any Overseer, nor can she agist Cattel there. *Dyer* 285. 2. H. 8. *Killoway* 159. He who hath reasonable Herbage cannot inclose, but hee which hath Herbage may inclose. Then forasmuch as here the Patent is larger then it was before, *scil.* that which was surrendered, the Patent is void; for the Queen Grants more then she took by the surrender: For hee did surrender *en intentione*, that the Queen should regrant him *premissa*; and by this new Grant he hath more. 2. He recites, That hee had a Lease for fifty years absolutely, whereas it was determinable upon death; and the Queen grants the same for fifty years absolutely, and that was by reason of his false Suggestion. It may be objected, That the Queen is not deceived, for the limitation for life is not annexed to the *Habendum*. 20. *Eliz.* in the Kings Bench, *Hunts Case*; The Queen made a Lease to begin at a day to come, and afterwards the Queen by the suggestion of the party, and for the surrender of the present Lease, did make a new Lease unto the party; it was adjudged, That the new Lease was void. So here, the Queen was deceived in the quality of the Lease. 9. *E. 4. 12. Baggots Case*; The King reciting that *Baggot* was born in *Normandy* (whereas in truth he was born in *France*) made him a Denizen; and the Patent, notwithstanding this false recital of the party, was adjudged good, for the intent was to make him a Denizen: That Case was objected against me. But put the Case a little further, and it is otherwise; for if at that time *Edward* the fourth had had Wars with *France*, then the Patent had been void, for it was not the Kings intent to protect a man who was an Enemy, and to nourish him in his own bosom. If

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the Queen had made the new Lease to begin after the first fifty years, then it had been void. *C.1. part* the Rector of *Che- dington's* Case ; It is not the years, but the death of the Patentee which determines the Lease. *C.2. part 72.* In a Deed there is not any proper place where the Proviso shall be inserted, then if it come in any place, so as it doth not lean upon a Covenant, it is a good condition. 35. *Eliz.* betwixt *Throgmorton* and Sir *Moile Finch*. Queen *Mary* made a Lease unto *Throgmorton* for 21 years, and in the end of the Lease there is a Proviso, That the Lease shall cease if the Rent be behind. *Popham* Chief Justice said, That *Throgmorton* hath such a Lease which is absolute, but shortned by limitation in the end of the Lease ; and he might plead it generally and absolutely, That those who will take advantage of the Proviso, ought to shew where the Proviso comes in another clause. So here *Pawlet* should have informed the Queen of the Proviso, for hee trusts the Queen, and the Queen trusts him. The third Falsity is, It is pretended, That the Park of *Odiham* doth passe with the Manor ; for the Manor is granted by King *Philip* and Queen *Mary*, *cum pertinentiis* ; and it is found by the Jury that the Park is parcel of the Manor. He hath deceived and mis-informed the Queen ; for in the Lease which he surrendred, the Park is excepted, and now he would steal it in by the general words, *cum pertinentiis*. If the Park doth not passe, then the Defendants are Trespassors to the Plaintiffe ; and if the Manor doth not passe, then they are Trespassors ; so as they are in a *Dilemma*. This Park (admit the Manor passeth) doth not passe : for Queen *Mary*, shortly after, made *Pawlet* a Marquess, and then she granted unto him by Letters Patents. The custody of the Park, and the Interest of the Park cannot stand together in one person ; and he cannot be the Queens Parker, when as it is his own Park. *C.8 part 117.* The best Expofitor of Letters Patents, are the Letters Patents themselves, joyning one part of the Letters Patents with the other. And here in one clause the custody of the Park is granted by exprefs name ; and the general words, viz. Grant of the Manor *cum pertinentiis* doth not convey it. There is a difference betwixt the Custody of a Park, and the Interest of the Park. In *Com.399.* If a Parker be attainted and pardoned, hee loseth not his Park, but hee may be a Parker notwithstanding such Attainder ; but if the Owner of a Park be attainted and pardoned, he loseth his Park ;

Park; a Parker is a matter of service, and cannot be forfeited; but an Interest may. 10. *H. 7. 6.* The Keeper shall render account for the Hawks, for it is parcel of the profits of the Park; but Lessee for years of a Park shall not render account for them: So there is a difference betwixt the Interest in a Park, and a Parkership. 12. *H. 8. 1.* Lessee for years of a Park suffereth the Pale to fall down or decay, Waste lieth; but if a Parker suffereth the Pale to decay, he can onely lose his Office. *Dyer 71.* The Owner of a Park may dispark it, but he who hath only the Herbage of it, cannot. A man hath the custody of a house, and afterwards he becomes the Owner of the house; his custody therein ceaseth. There are four Mischiefs in our Case: 1. By expressing himselfe to be Parker, hee excludes himselfe from being Owner. 2. The Keeper is Accountable, but Lessee for years is not. 3. If he be only Keeper of it, then the Queen might dispark: but if he were Lessee, the Queen could not. 4. Where he is Keeper, all will rest upon account, as well the Deer which hee findes there when hee became Keeper, as those which came after. But that makes the Queen in doubt, whether the Exception should extend to the Deer; then whether to those Deer which came after:

The third Point was concerning *WALSINGHAM'S* Lease; It is of the Manor, and *Custodiam Parci*. First, This Lease hath one of the wounds of the former Leases: for the Parkership is granted expressly. Secondly, The leases before being void, then this Lease must needs be void also. Thirdly, This Lease is to take effect upon the end, Surrender, or Forfeiture of the Lease to *Pawler*, which was made 5. & 6. *Philip* and *Mary*, and that lease had not any beginning, and therefore was void; and so the three limitations, End, Surrender, or Forfeiture cannot happen. *Dyer 197, 198.* From the death of the Father the lease which is made to the Son shall begin, the Father being dead, it is a void lease to the Son. *C. 6. part 25.* Enumeration of particular times, if it do not happen within the particular, then it shall never begin: And so it is of this lease to *Walsingham* in our Case. Note, it was said by Sir *Henry Yelverton*, That it was the opinion of the Judges in this Case, That he had but the custody of the Park, and not the interest of the Park; for by the acceptance of the custody of a Park, when he hath a lease of

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the Park it selfe before, it is a surrender of his lease. *Davenport* argued for the Defendant *Mores*. The question which is made of the lease of 27. *Eliz.* rests upon the lease made to *Genny* 33. *H.8.* which was determined upon the surrender of the lessee. 2. It rests upon the lease made to *Pawlet*. 36. *H.8.* which was for fifty years, determinable by two Provisoes; the one for not payment of a sum in gross. 3. It rests upon the lease made to *Pawlet*. 5 & 6. *Ph. & M.* for 50 years from Mich. last past, upon the death of *Pawlet*, or committing of Waste. The lease of 27. *Eliz.* is a lease in reversion for 31 years, to begin after the surrender, forfeiture or expiration of the lease made 4 & 5 *Ph. & M.* to *Pawlet*. Exception is taken to the lease 36. *H.8.* because it hath two falsities; the first, Because it mis-recites the lease of 33 *H.8.* reciting the same to be dated 32 *H.8.* whereas in truth it was dated 33 *H.8.* and that varies the term of years, and that lease is not good at the common law, nor as they objected, is it helped by the Statute of 34. *H.8.* of Mis-recitalls. Secondly, Because it is upon a false suggestion of the Patentee, and therefore it is void. It was also objected, That the lease of 5 & 6 *Philip and Mary* was void for two causes; first, Because that that recites the lease of 36. *H.8.* to bee for fifty years, without the Proviso of determination by the death of *Pawlet*. 2. The King is deceived in his Grant; for they objected, That it was recited to be surrendered *ea intentione* to regrant *eadem premissa*; and there are other things granted which were not surrendered; They say, That the Lease is said to be of the Parkership, and not of the Park; for that doth not passe by the generall words *cum pertinentiis*; for by expresse words the Parkership is granted, and then not the Park it selfe. The Lease of 33. *H.8.* was truly surrendered; But the King reciting that the Patent bearing date 32. *H.8.* was surrendered in consideration of service, did grant the office of Parkership, &c. And *insuper* the Manor for fifty years, &c. The question is, If this misrecitall be helped by the Common Law: if it be not, then if the Statute of 34. *H.8.* doth help it? The Lease which was mis-recited was not in *esse*; and there is a difference when the Lease which is recited, is not in *esse*, but determined; and when former Leases are recited, as Leases in *esse*. There are three things in which misrecitall is materiall, and doth vitiate the Patent. 1. Misrecitall of the Tenant to whom the Lease was made,

or

or of the Tenant which was last possessed. 2. Misrecitall of the thing demised. 3. Of the Estate in *esse*, and the Limitation. If in such case of misrecitall, there be not a *Non obstante*, then the Patent is void at the Common Law; C.4. part 35. The King by the Law ought to be truly informed of estates in *esse*, and also of his Rents and Revenue; But by the Common Law, if the former Leases be recited to be determined, (and in truth, they are,) and the new grant is upon another consideration, then it is not materiall, if they be misrecited; for that it is not any part of the consideration. *Vide* 38. H. 6. 37. *Darby*. If the misrecitall be in any thing not materiall, which need not to be recited: and no part of the consideration of the new Lease, then it shall not make void the Patent; for that the misrecitall was not of any thing materiall. If the misrecitall be of a thing determined, and the second Patent depend thereupon, then the second Patent is void; for if the King recite a Lease made to *I. S.* which is determined, and demise *tenementa predicta sic ut prefertur*; and in truth the Lease recited was made to *I. D.* the second Lease is void: 38. H. 8. *Br. Patents* 101. The King Tenant in taile makes a Lease for life, the successour King may make a new Lease without recitall, and if he do misrecite the lease which is determined, it is not materiall. If our Lease should be void at the Common Law, yet it is helped by the Statute of 34. H. 8. cap. 21. by expresse words, the same extends to all Leases, with, or without consideration, notwithstanding misrecitall, or non-recitall; yet all misrecitals are not helped by that Statute: if the misrecitall be of Leases, which are not the guide of the second Patent, and need not to be recited, such misrecitall is helped by the Statute. But if the former Patent begetteth the later, then the Statute doth not extend unto it, for then the last is void, for that the King is deceived, and not by reason of the misrecitall. *Dyer* 194. 195. The Case there is direct to prove our Case; for there the recitall was of the grant of an Office, 33. H. 8. whereas it was dated, 32. H. 8. *Et quia omnia, &c.* And there was not any surrender, for in truth it was not surrendered to the Master of the Rolls, who died before it was entred: There it is resolved, That it is not helped by the Statute of *Queen Mary*: for in that Act there is an expresse clause, that it extend not to the grant of an Office, (as in the Case of *Dier* it was) and then it was left at the Common Law, and the *Queen* was deceived, because the surrender was not good. The defect of the second Patent was, That it was not in the Crown by the surrender, but if it had been well surren-

surrendred, the misrecitall had been helped by the Statute of 34. H.8. for it was the misrecitall of the year, that the Patent bore date. C.2. part, *Doddingtons Case*, *Dyer* 129. upon the Statute of 34. H.8. The misrecitall of the Town is not helped; for it doth not appear unto the Court what Land was intended to be granted: But if the thing had been certainly and particularly named, so as it might appear to the Court what Land was intended to passe; then the mis-recitall of the Town had been helped by the Statute of 34. H.8. A thing granted generally with reference to a misrecited Patent, is not helped by the Act of 34. H.8. But when the thing granted is particularized with reference to a thing which is determined in a misrecited Patent, then the Statute of 34. H.8. will help it; but in our Case, the misrecitall is of a thing which needed not to be recited. The second Objection which hath been made, is, That the King is deceived, by reason of the false suggestion: And then the Letters Patents made by reason thereof are void. I answer, That if the false Suggestion tendeth to the detriment of the Crowne, and to the apparant prejudice of the King, then the Letters Patents may bee avoided: But where the Suggestion is of a thing not materiall, and doth not tend either to the deceit of the Crowne, or to the Kings prejudice, neither in his profit, nor his Inheritance, there it shall not make void the Letters Patents. *Dyer* 352. Where an Abbot Lessee for sixty years of the Queen, made a Lease for eighty yeares; the sixty years expired, the Lessee for eighty years surrendred to the Crown, and in consideration of that Surrender, to have a new Lease; there the second Patent was void, for the King was deceived in the reall consideration. And *Dyer* there said, That it was but the Suggestion of the party, and the Collection of the Queen. C.5. part 93.94. Where Lessee for yeares of the King did assigne part of his Terme and Land to another, and then surrendred, the surrender there was the consideration; and that was not good. If the recital be made of a thing which needeth not to be recited, and the Patent is made upon another consideration, there the misrecital shall not hurt it, C.1. part 41. where *Henry* the seventh, reciting *cum post &c. virtute cuius, &c.* the estate is recited, as determined; the Reversion shall passe; for the King was certified of the estate: And in our Case it is determined. Where the falsitie of the suggestion is not in deceit, nor to the prejudice of the King; If the thing misrecited be not materiall, it shall not make void the Patent. C.10. part 110. *Legates*

gates Case. *Qua quidem &c.* the false suggestion shall make void the Patent; for the King did not intend to abate his Revenue. *Fisz. Nat. Brev. Grants* 58. Falsitie of Tenure of the King shall make void the Kings Licence: For the falsitie of suggestion which came from the party, did tend to the prejudice of the King in his Tenure. *C. 10. part 110. Quod quidem manibus &c. ratione Escheata &c.* It shall make void the grant by this suggestion of the party which doth prejudice the King in his title. But where the Suggestion is not to the prejudice of the King in his revenue, tenure, nor title, it shall not make the Letters Patents void. *C. 10. part 113. MARKHAM's case.* The King grants the office of Parker, *quod quidem Officium* the Earle of RUTLAND late had; And the said Earl never had it; the Suggestion was of a thing not materiall to the second Patentee, nor to the Kings prejudice, therefore it was good. *10. H. 6. 2. Quod quidem Mancium seiscens fuit in manus nostras;* the false suggestion there shall not make void the Patent, because it was not of a thing materiall. If the King grant a Manor, *quod quidem Manerium nuper fuit in tenura I.S.* and in truth it was not in the Tenure of I.S. yet it was adjudged good: For *Nuper* is a Recitall of the thing that was, and not of a thing that is. For if it had not been in the possession of I. S. whereas in truth he was not seised or possessed thereof, there it had not been good. It is found in our Case, That the Lease is actually surrendered, and so the misrecitall is of a thing that was, *scil. nuper;* and not of a thing that is, or in *esse*.

The next Exception is to the Letters Patents of *Philip and Mary*. First, because thereby the Lease of *36. H. 8.* is not fully recited; For there was a *Proviso*, That if he did not pay a summe, in grosse, that it should be void; And that it should determine by the Death of *Pawlet* the Patentee. The misrecitall of that Collaterall matter by the Common Law, shall not make void the Grant. There are three things necessary in Recitalls: First, The Certainty of the particular estate in *esse*, with the Limitations. Secondly, The Tenant to whome the particular estate was made, or the Tenant which then is in possession. Thirdly, The thing granted, by the same name as it is granted in the first Patent. But Covenants, Reservations, Provisions, Conditions, and the like, need not to be recited. The Recitall ought to be of a thing in *esse*: *Avowry* 112. A Towne was granted by the King. And afterwards he granted unto another a Leet in the same Towne; the King in this case needed not to recite the grant of the said Towne. Secondly, The Recitall ought to bee in the same name as it was granted in the first Patent. And cannot be helped

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helped by averment, if it be misrecited. Thirdly, the Tenant of the Land, or the Tenant which was before the grant, ought to be recited, *scil.* that such a man *habuit*, to whom the first Patent was granted; Or, that he now hath the Lands, or lately had the thing granted in possession. *Brook Pat.* 96. Such things ought to be recited as ought to be pleaded against the King in an Information of Instruction. In our Case, the misrecitall being of nothing determined and not materiall, and not to be the guide of the second Patent, doth not make void the Grant to *Pawlet*.

It was objected, That *Queen MARY* was deceived: for the Grant was *de eisdem promissis*: And in the former Patent the Park was excepted; but so it was not in the Letters Patents to *Pawlet*: In the first Patent reasonable Herbage was granted; but in the second to *Pawlet*, the Grant was of Herbage generally. If the King except the Deer, as hee doth in this case, then hee ought to have sufficient herbage for his Deer: The Jury finde, That the Letters Patents of 36. H. 8. were absolutely surrendered *câ intentione*, that the King might make a new Lease *in forma sequente*, which is not *de promissis*, *sed de prementionatis*. Now the King for two hundred pounds Fine, is pleased to grant, *tam* in consideration of the Surrender, *quàm* for the Fine of two hundred pounds: And here the King took knowledg, that it ought to be *in forma sequente*: and then by reason of the Fine and Surrender, hee is pleased to vary from the former Patent, and it is to the prejudice of the Patentee: The first was reasonable Herbage; and here it is Herbage, and in the Kings Case it amounts to as much, as if hee had said, Reasonable Herbage: for because the King excepts the Deer, it is implied, That the Patentee is but to have reasonable Herbage. Here the Grant is not *De omnibus grossis arboribus, bonis & catellis Felonum*; and of the Goods of Felons themselves: and in the former Patent these were granted, and so the Grant is for the Kings benefit, and to the prejudice of the Patentee. Also this Patent is *ad proficuum Domini Regis*: For here is a Rent reserved, and here is a *Proviso* for the committing of Waste in the premisses, which were not in the first Letters Patents; and in these Letters Patents there are divers Covenants which were not in the former Patents: and so it is *in forma sequente*: And so the Lease of *Philip and Mary* is good. The King seised of a Manor to which he hath a Park, doth grant the Stewardship of the Manor, and the Custodie of the said Park, with reasonable Herbage: Afterwards in the same Letters Patents hee grants the said Manor of *O.* and all the Lands in *O.* excepting grosse trees in the Park.

If this Grant be not good for the Manor, it is not good for the Park. that was the Objection: It is good for the Manor, and also for the Park. It was objected, That the King grants the custody of the Park, and so not the Park it selfe; for how can the King grant the custody of the Park, if he grant the Park it selfe; it is dangerous, that upon an implication in one part of a Patent, the expresse words which follow should be made void; the subsequent words in this Case, are, The King grants the Manor, and all the Lands to the same belonging; now the Park doth belong to it, and the King excepts only the Deer, C. 10 part 64. The King at this day grants a Manor unto a man, as entirely as such a one held the same before it came into his hands, &c. the Advowson doth passe without words of grant of the Advowson; for the Kings meaning is, That the Advowson shall passe: The meaning of the King is manifest in our Case; C. 3. Part 31, 32. Carr's Case, There the Rent was extinct betwixt the Parties, yet for the benefit of the King for his tenure, it hath continuance; for a thing may be extinct, as to one purpose, and in esse as to another purpose. 38. Aff. 16. a Rent extinct, yet Mortmain. Dyer 58, 59. The Exception ought to be of the thing demised. In our Case the Park doth passe, but the King shall have the liberties in it; and so here the Park shall passe, and the Exception is of the liberties; Com. 370. the Exception ought to be of that which is contained in the former words, in the former Patents; the Offices were first granted; and in the same Letters Patents the Manor was afterwards granted. But now King James grants the Manor first, and then the Offices. Construction of Statutes ought to be *secundum intentionem* of the makers of them; and construction of Patents *secundum intentionem Domini Regis*, C. 8. part 58. You ought to make such a construction, as to uphold the Letters Patents, C. 8. part 56. Auditor Kings Case; There the Letters Patents were construed *secundum intentionem Domini Regis*, and adjudged good: But to make void the Patent, they shall not be construed *secundum intentionem*, but to make a Patent good, they shall be construed *secundum intentionem Domini Regis*. The Case was adjourned till Michaelmas Terme next. Note, I have heard Sir Henry Yelverton say, That it was the opinion of the Judges in this Case, That he had but the custody of the Park, and not the interest of the Park; for that by the acceptance of the custody of the Park, when he had a Lease of the Park before, it was a surrender of his Lease.

Trinit. 21. Jacobi, in the Kings Bench.

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SHORTRIDGE and HILL's Case.

Shortridge brought an Action upon the Case against Hill for ravishing of his Ward; and the Writ was *contra pacem*, without the words *Vi & armis*, Lib. Dent. 366. where three Presidents are of Actions upon the Case, without *Vi & armis*: An Action upon the case for doing of any thing against a Statute, must be *contra pacem*. Ley Chief Justice, Recovery in this Action may be pleaded in Barre in a Writ of Ravishment of Ward brought. Dodderidge Justice, The Action of Trespasse at the common Law, is only for the taking away of the Ward; and here he hath elected his Action at the common Law, and then he shall not have an Action upon the Statute, viz. a Ravishment of Ward; but here the Action upon the Case is brought for the taking and detaining of the Ward, so as he cannot prefer him in marriage; and upon this speciall matter the Action upon the Case lieth without the words *Vi & armis*. A Writ of Ravishment of Ward ought to be brought in the Common Pleas; but yet you may bring a Writ of Ravishment of Ward in this Court, if the Defendant be in the custody of the Marshal of the Marshalsey, for in such special Case it shall be brought in this Court: if there be an extraordinary matter besides the Trespasse, then an Action upon the Case lieth; as when *A.* contracts with *B.* to make an estate unto *B.* of Bl. Acre at Michaelmas, if *C.* enter into Bl. Acre, *A.* may have an Action upon the Case against *C.* for the speciall damage which may happen to him, by reason that he is not able to perform that contract by reason of the entry of *C.* and he shall declare *contra pacem*, but not *Vi & armis*.

Trinit. 21. Jacobi, in the King's Bench.

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BAKER and BLAKAMORE's Case.

IN Trespasse, the Defendant pleaded, That *J. S.* being seised in Fee, gave the Lands unto Baker and the Heirs of his body, and conveyed the Lands, by descent, to four Daughters; and Blakamore the Defendant, as servant to one of the Daughters, did justifie. The Plaintiff did reply, That the said *J. S.* was seised in Fee, and gave the same to Baker and the Heirs Males of his Body, and conveyed the Land

Land by descent to himself, as Heir Male, *absq; hoc*, that *J. S.* was seised in Fee. *Henden* Serjeant did demur in Law upon the Replication; and took Exception to the Traverse, for that here he traverseth the Seisin of *J. S.* whereas he ought to have traversed the gift in tail made by *J. S.* for the being seised is but an inducement not traverseable, and therefore he ought to have traversed the gift in taile, for then he had traversed the seisin; for he could not give the Lands in tail, if that he were not seised thereof in Fee, *L. 5. E. 4. 9.* there in *Formedon*, the Tenant would have traversed the Seisin of the Donor, but the book is ruled, that the Traverse ought to be of the gift in tail, and that includes the Seisin. *Bridgment* for the Plaintiffe, and said, That the Serjeant is of opinion contrary to the Books, when he saith positively, that you ought to traverse the gift in tail, and not the seisin of the Donor. The Case shortly is, *A.* being seised in Fee, makes a gift in tail to *B.* and that descends to four daughters, &c. And the Plaintiff replies, That *A.* was seised in Fee, and gave the Lands to *B.* and to his Heirs Males; and the Plaintiffe claimes the entail as Heir Male: and the Defendants under the generall tail, *absq; hoc* that *A.* was seised in Fee, *27. H. 8. 4.* by *Englesfield*, If in Trespass the Defendant plead the Feoffment of a stranger, and the Plaintiff saith, That he was seised in Fee, and made a Lease for years to the said stranger, who enfeoffed the Defendant, he need not to traverse, *absq; hoc*, that he was seised in Fee, *C. 6. part 24.* The seisin in Fee is traverseable, *Br. Travers 372. acc. Dodderidge Justice*, The seisin in this Case is traverseable. *Ley* Chief Justice, Take away the Seisin and then no gift, and therefore the Seisin here is Traverseable. *Haughton* and *Chamberlain* Justices agreed. The Court resolved, That either the Seisin in Fee, or the gift in tail, is traverseable. *Dodderidge Justice*, If you both convey from one and the same person, then you must traverse the conveyance. It is a rule *C. 6. part 24.* there the Books are cited, which warrants the traverse of either. *Quod nota.* It was adjudged for the Plaintiff.

Trinit. 21. Jacobi, In the Kings Bench.

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Sir EDWARD FISHER and WARNER's Case.

THE Testator being indebted unto *Fisher*, made *Warner* his Executor: and *Warner* in consideration that *Fisher* would forbear suing of him upon the Assumpsit of the Testator, did promise to pay him Fifty Pounds; and in an Action upon the Case upon this promise, *Warner* pleaded *Non Assumpsit* in the Common Pleas, and it was found for the Plaintiff. And a Writ of Error was brought in this Court, be-

428 *Sir Edward Fisher and Warner's Case.*

cause it was not shewed for what consideration the Testator did promise. 2. Because it was not shewed, That *Warner* the Executor had Assets in his hands. It was said by the Council of *Sir Edward Fisher*, That they need not shew that he hath Assets, because the Defendant *Warner* was sued upon his own promise. *C. 9. part 94.* The Testator made a promise to pay to *Fisher* fifty pound, and died; The Executor in consideration of the forbearance of a Suit upon that promise of the Testator, doth assume to pay, &c. The Jury find for the Plaintiff. The Error is, that no time is limited, nor no place where the promise was made; and also it is not shewed when the Testator died, and so it is not shewed whether the promise were made in the life time of the Testator, or not? for if it were in the life time of the Testator, then the promise was void. Nor is the time of the forbearance shewed: and so no good consideration. *Hill. 5. Jacobi*, a consideration to forbear *panululum tempus*, is no good consideration by *Cook*. And the like case was adjudged, 36. *Eliz. Rex.* 448. *Sackbidos* case. We do alledge *de facto*, that we have forborn our Suit, and that the Defendant hath not paid us the money: *Dodderidge* Justice, It is alledged, that the Plaintiff paid money to the Testator, upon which he promised; And the Action now brought, is upon the promise of the Executor: Part of the promise, is, That he paid the fifty pound to the Testator, and that ought to be proved in evidence to the Jury: *C. 6. part Gregories* case, if it be not specially named how he shall prove it. *Haughton*, to forbear to sue him, is for all his life time, and not *panululum tempus*. *Dodderidge* Justice, Exception was taken, that he doth not shew that the Testator was dead at the time of the promise by the Executor: It was shewed, That after the death of the Testator, that he took upon him the Execution of the Will, and then promised; and that of necessity must be after the death of the Testator.

Trinit. 21. Jacobi, in the King's Bench.

495 WILLIAM'S and FLOYD'S Case.

IN an *Ejectione firme*, The Array was challenged, because it was made at the Nomination of the Plaintiffe: And by consent of the parties, two Attorneys of the Court did try the Array: The question was, Whether the Triall of the Array was good? It was said by the Council which argued for the Defendant, That it was not good. If one of the four Knights be challenged, the three other Knights shall try that challenge; and if he be found favourable, he shall be drawn; and if another of the Knights be challenged, hee shall be tried by the other

TWO;

two; and if one of the two be challenged, then a new Writ shall issue forth to cause three Knights to appear. 9. E. 4. 46. The two which quash the Array ought to try the Array of the *Tales*; for that they are strangers to them. The assent of the parties in this case is to no purpose; for the consent of the parties cannot alter the Law, neither can the King alter the Law, but an Act of Parliament may alter the Law. 29. *Ass. 4* 19. H. 6. 9. by *Newton*. 27. H. 8. 13. Where a triall cannot be out of the County by the assent of the parties; and if it be, it is error. By the Counsel of the other side, contrary. This triall of the Array is much in the discretion of the Judges; for sometimes it is tried by the Coroners, and they are strangers to the Array. 21. *Ass. 26*. 20. *Ass. 10*. there the Judges at their discretion appointed one of the Array, and the Coroners to try it; 27. *Ass. 28*. there, upon such a challenge it was tried by the Coroners: and *Shard* said, That the triall by any of them was sufficient, and by *Forriners de Circumstantibus*, 31. *Ass. 10*. so as it rests much in the discretion of the Judges. 29. *Ass. 3*. there it was denied: But note, That that was in *Oyer and Terminer*; and there it did not appear that the Array was made at the Nomination of one of the parties: but in other challenges it may be tried by one of the Panell. But in our case, they were all challenged, was the objection. 9. E. 4. 20. *Billing*. For if one of the parties will nominate all of the Jurours to the Sheriffe, it is presumed that they are all partiall: and in this case, the whole Array is challenged: but in other cases he may challenge one or two of the Array, and yet the others may be indifferent. But admit it had been error, yet being by the assent of the parties, it is no error. *Baynams* case in *Dyer*. A *Venire facias* by assent of the parties was awarded to one of the Coroners, and good: *Dyer* 367. 43. E. 3. Office of Court, 12. One of the twelve doth depart; If the Justices do appoint one of the panell to supply his place, it is erroneus; but yet if it be with the assent of the parties, it is good; So in our case, 21. E. 4. 59. *Brian* saith, That he hath not seen more then two to try the Array, yet by assent of the parties more may try it, 30. E. 3. 2. or 39. E. 3. 2. In a Writ of Right, processe issued to the Sheriff to return four Knights; he returns two Knights, and two Esquires, without making any mention that there were no more Knights in the County, the same is error; yet if two Knights and two Esquires had been returned by the assent of the parties, it had been good. 6. E. 6. *Dyer*. A man cannot enter for Non-payment of Rent without a demand, yet by assent of the parties it may be good. 22. H. 6. 59. the triall in favour of Liberty ought to be in the same County where the Action is brought, and not where the Manor is: But 44. E. 3. 6. by the assent of the parties it is sufficient. In the Abridgement of the Book of Assizes 48. the books are cited to the contrary; there it is said to be no Law, where the Coroners try the panell: I agree, that where it is not against a fundamentall point.

point of the common Law, that the consent of the parties *tollit erro-*
res: Dodderidg Justice, Two questions are in this case, 1. If this tryall be
 good. 2. Admitting it be not good; whether the assent of the parties
 doth make it good. First it is a meer matter in the discretion of the
 Justices, which is not tied to any strict rule in Law: In the Book of
 the Assizes it was tried by the Coroners, because it was in the discre-
 tion of the Justices: And the Coroners are Ministers to the Court, and
 ought to attend at the Assizes. The Book of the Assizes is the Report
 of the Cases which happened at the Assizes in the Circuits of the Justi-
 ces; and they are not Term cases. For the Exception which is taken
 by him who made the Abridgment of the Book of Assizes, is of no mo-
 ment; for the Authour thereof was but a Student, and no Councillor
 at Law. In these Courts the Coroners do not attend; therefore some-
 times two, four, or six of the Panell are chosen to try those who are
 challenged, as the Court shall think fit; and if the Triers cannot agree,
 we put them together into a room, and swear one to keep them, (as a
 Jury is kept:) so as you see it rests much in the discretion of the Justices, &
 Court: And if there were a certain rule to try it, then it ought to be
 strictly observed. 31. *Ass. 10.* there the triall was *de Circumstantiis*.
 2. The assent of the parties doth make it good. It is not a triall in point
 of the right of the cause, but only of the indifferency of the Ministers:
 The Array was challenged, because the Sheriffe made it at the request
 of one of the parties; and the Sheriffe hath confessed it upon his Ex-
 amination. The principal Array shal be first tried; and if that be quash-
 ed, then the *Tales* shall not be tried; but if it be affirmed, then two of
 the Panell shall try the Panell, and two of the *Tales* shall try the *Tales*.
 This is a triall only of indifferency, and not of the fundamentall point
 of the Cause. If the Plaintiffe require the *Venire facias* to the Co-
 roners, because that the Sheriffe is chosen; the Defendant shall be
 examined if he will agree to it: if he will not agree, but the Sheriffe
 returneth the Jury, the Defendant in that case shall not challenge the
 Jury, or any of the Array: The four Knights in the Writ of Right
 shall choose the other twenty of the Grand Assize, who shall be joyn-
 ed with them, and they shall be the Judges of the twenty, when they
 are named by them, 39. *E. 3. 2.* *Haughon* Justice, The appearance by
 Attorney by assent of the parties, is not error, although by the Law
 the Plaintiffe ought for to appear in proper person. *Chamberlain*
Justice would be advised, because he had not seen the Books. *Ley* chief
 Justice, When the whole Panell, as in this case, comes to be challenged,
 then it is in the discretion of the Justices to choose triers; and chiefly
 in this case, because all the Array is partiall. If the Coroners be ab-
 sent, it is good to take two Attorneys of the Court, who the Court
 know to be honest by their honest carriage, and fair practice. The
 assent of the parties strengthens this case. It is a rule, That the assent

of the parties cannot make that good which is against any fundamentall point of the Law: therefore it is best to view the Presidents, and to draw a Jurour; but that we cannot do of our selves by the Law, yet with the assent of parties we may do it. It is a contempt and a deceit to the Court, if his assent be entred upon record, and notwithstanding that the Defendant will question the matter by a Writ of Error, or otherwise relinquish his consent; and for such contempt the Court may commit him, and fine him also: But if the matter be not a matter of Record, but be onely by a Rule of the Court, then we may award an Attachment onely against the party. In this case, the triall of the Panell was good, and so was it afterwards adjudged by the whole Court. *Quod nota.*

Pasch. 3. Caroli, in the King's Bench.

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EVERS and OWEN's Case.

Samson Evers the Guardian of Compton Evers, did sue Owen the Executor of the Lady Anne Evers for a Legacy, before the Council of the Marches of Wales. Henden Serjeant moved for a Prohibition, and said, That by Law, no intent of a Will ought to be averred contrary to the words of the Will, C. 5. part 68. *Cheyneys* case: And so no equity shall be taken upon a forraign intent, contrary to that which is in the Will. 2. He said, That the party might not sue in the Marches of Wales for a Legacie; for that the party ought to sue for the same in the Ecclesiasticall Court. *Banks* contrary, They may proceed there in an Ecclesiasticall Cause, wherein there is cause of equity: The Statute of 34. H. 8. cap. 26. giveth power unto them to proceed as they proceeded heretofore by Commission. And before that Statute they proceeded there in case of a Legacy; and so are divers Presidents; therefore no Prohibition is to issue. *Samson Evers* is the Kings Attorney for the Marches of Wales, and his personall attendance is requisite there: And this Court cannot grant a Prohibition to stay a Suit, when he cannot sue in this Court for the same thing. *Finch* Recorder contrary. If you shew Presidents, yet they will not bind this Court, and give power unto them to hold plea of that which they ought not to hold plea of. It is usuall to grant a Prohibition, if the Court of Requests holds plea of a Legacy, if it be not by reason of some speciall circumstance; and it is usuall to dismisse Legacies out of the Chancery: And no Priviledges shal be granted unto an Executor, Administrator, or Guardian. *Hyde* Chief Justice: Two have an Obligation as Executors, and the one releaseth; it is good, and a good

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good cause of equity against him who releaseth: A Will is made, and A. is made Executor, and no trust is declared in the Will; and at his death the Testator declares, That his Will is for the benefit of his children: May not this intent be averred? there is nothing more common. *Dodderidge* Justice, For the making of an Estate, you cannot averre otherwise then the Will is; but as to the disposition of the estate, you may averre. *Jones* Justice, There are two Executors; one commits waste, or releaseth, &c. the other hath no remedy at the common Law, for that breach of Trust. The reason of *Chenyes* case, C. 5. part is, Whosoever will devise Lands, ought to do it by writing; and if it be without the writing, it is out of the Will, although his intent appeareth to be otherwise. Before the Statute of 34. H.8. cap.26. The Marches of *Wales* held plea of all things, for things were not then settled. But the said Statute gave them power and authority to hear and determine such causes and matters as are, or afterwards shall be assigned to them by the King, as heretofore had been used, and accustomed: Now if it be assigned by the King, yet if it be not a thing accustomed and used to be pleaded there, it is not there pleadable. So if it be within the Instructions made by the King, yet if it be not used and accustomed, it is not pleadable there; but it ought to be within the Instructions, and also accustomed and usuall; Adultery, Symony, and Incontinency, are within their Instructions, and are accustomed. The things being accustomed to be pleaded there, have the strength of an Act of Parliament; but by the Instructions they have no power to proceed in case of Legacy. Then let us see if the same be included within the generall words (things of Equity) within the Instructions: And then I will be tender in delivering of my opinion, If a Legacy be pleadable there or not? *Whitlock* Justice: The Clergy desired that they might forbear to intermeddle with Legacies: Five Bishops one after the other, were Presidents of the Marches there: and they draw into the Marches spirituall businesse: but originally it was not so; their power was larger then now it is, for they had power in criminall causes, but now they are restrained in that power. There is a common Law Ecclesiasticall, as well as of our common Law. *Ius Commune Ecclesiasticum*, as well as *Ius Commune Laicum*. The whole Court was of opinion, That the Kings Attorney in the Marches being out, we ought to have priviledge there. In the Chancery, there is a Latine Court for the Officers of the Court, and the Clerks of the Court for to sue in. But in the principal Case, a Prohibition was not granted, because there was much matter of Equity concerning the Legacy. It was adjourned.

Pasch.

Pasch. 3. Caroli, in the Kings Bench.

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HARLEY and REYNOLD's Case.

HArvey brought an Action of Debt upon an Escape against *Reynolds* (*Hill. 1. Car.*) *Reynolds* pleaded, That before the day of Escape, *scil.* the twentieth day of *January 1. Car.* That the Prisoner brake Prison and escaped; and that he afterwards, *viz.* before the bringing of this Action; *viz. 8. die Maii 2. Car.* took the Prisoner again upon fresh Suit. *Answers* for the Plaintiff, *Reynolds* is bound to the last day. *viz. 8. Maii.* and not the day before the bringing of the Action; for the Bill bears date, *Hill. 1. Car.* and the terme is but one day in Law, *c. 4. part 71.* and so no certain day is set for the Jury to find. The day which *Reynolds* sets that he retok the Prisoner is the eighth day of May, and he shall be bound by that, *Com. 24. a. 33. H. 6. 44.* Where a day is uncertain, a day ought to be set down, for a day is material for to draw things in issue, *C. 4. part 70.* the Plaintiff shewed, That *7. Maii 30. Eliz.* by Deed indented and inrolled in the Common Pleas *Ter. Pasch.* in the said thirtieth year (within six monthes according to the Statute) for the consideration of One hundred Pounds, did bargain and sell: But he further said, That after the said seventh day of May, in the said thirtieth year, he levied a Fine of the Lands the now Plaintiff; after which Fine, *viz. 29. Aprilis*, in the said thirtieth year, the said Deed indented was enrolled in the Common Pleas. Note, That another day more certain was expressed; therefore the mistaking of the day shall not hurt: And there it was helped by Averment, *8. H. 6. 10. Repleader 7.* In Waite, the Defendant said, That such a day, before the Writ brought, the Plaintiff entred upon him, before which entry no Waite was done, &c. *Strange*, It might be that he entred again; wherefore the Court awarded that he should recover. *Co. Entries 178.* In Dower the Tenant vouched a stranger in another County, who appeared; and there the Replication is, *viz. die Luna. &c.* so the day ought to be certain. *19. H. 6. 15.* In a Formedon, If the Defendant plead a thing which by the Law he is not compelled to do; and the Plaintiff reply, That she is a Feme sole and not Covert, it is good; but if he plead, That such a day, year and place, there the Trial shall be at the particular place, otherwise the Trial shall be at the place where the Writ bears date. *C. 4. part, Palmers Case*; If the Sheriff sell a Term upon an Extent, and puts a Date to it, *scil.* recites the Date, and mistakes it, the sale is not good, for there is no such Lease, *Dyer 111.* Then it is said *31. Octobris*, and there by the computation of time it

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was impossible; and so here the time is impossible, *scil.* that 8. *Maii* 2. *Car.* should be before *Hill.* 1. *Caroli*; for the taking is after the Action brought, and so naught to bar the Plaintiff: it is the substance of his bar upon which he relieth, and so no matter of form: 20. *H. 6.* there upon an Escape, the Defendant said, That such a day, *ante impetrationem billæ* in this Court; *scil.* such a day, he retook him; and the day after the *scilicet*, is after the purchase of the Writ: there the *scilicet* and the day expressed shall be void, and it shall be taken according to the first day expressed: if the Sheriff had retaken him before the filing of the Writ, it had been a good plea in Bar, otherwise not. *Galtrope* contrary, *H.* brought debt, *Hill.* 16. *Jacobi* against *Cropley*; and 9. *Junii* 19. *Jacobi*, *Cropley* was taken in Execution, and delivered in Execution to R. by *Habeas Corpus*; afterwards 1. *Caroli*, *Cropley* escaped, and H. brought debt against R. who pleaded a special Plea, and shewed, That 20. *Januarii* 1. *Caroli*, *Cropley* brake prison and escaped, and that he made fresh Suit untill he took him; and that before the purchase of the Bill; *scil.* 8. *Maii* 2. *Caroli*, he was retaken, 16. *E. 4.* If he retake him before the Action brought, it is a good bar; so if the taking be before the Action brought, R. is excused. We say, That *postea*, & *ante* the purchasing of the Bill; and I suppose we need not lay down any day, but the *postea*, & *ante* makes it certain enough. If the *viz.* be repugnant to our allegation, it is surpluseage. 41. *Eliz.* in *Communi Banco*, *Bishops Case*, Trespass is brought for a Trespass supposed to be done 4. *Maii* 39. *El.* It is ruled in that Case, That the *videlicet* doth not vitiate the premises; because it is surpluseage. *Trinit.* 34. *El.* in the Kings Bench, *Garford and Gray's Case*, In an Avowry: it was shewed, That such an Abbot surrendred, 32. *H. 8.* and that the King was seised of the possessions of the said Abby; and that *postea*, *scilicet* 28. *H. 8.* the King did demise, and that the same descended to King *Ed. 6.* there it was ruled that *postea* had been sufficient, though he had not shewed the year of the demise of the King; so here, *postea*, & *ante* do expresse that he was taken before the Bill brought. *Dodderidge Justice*, If the day had been certain at the first, and then he cometh and sueth, that *postea*, *videlicet* such a day, and alledgeth another day which is wrong, there the *videlicet* is not material; but if the first day be uncertain, then the *videlicet* ought to be at a certain day, otherwise it is not good. *Curia*, If you had left out your time, (your *videlicet*) it had been good, for you must expresse a certain time; for when the time is material, it ought to be certain. If you had layed down a certain day of the purchase of his Bill, then the *ante* would have been well enough. *Dodderidge Justice*, If a thing is alledged to be done in the beginning of the Term, *quare* if that shall be intended the first day of the Term; if you can make it appear that it must be intended of necessity of the first day of the Term, then you say

God and Winche's Case.

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say somewhat, and then the *videlicet* is void and surplufage. Judge-
ment was given for the Plaintiff.

Pafch. 3. Caroli, in the Kings Bench.

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DEAN and STEELE's Case.

AN ACTION upon the Cafe for words, was brought for words spoken in the Court of *Sudbury*; and it was layed, That he did speak the words at *Sudbury*, but did not say *Infra jurisdictionem curia*.
2. The Judgement in the Action upon the Cafe was, *capitur*: And for these two Errors the Judgement was reversed.

Pafch. 3. Caroli, in the Kings Bench.

499

GOD and WINCHE's.

THIS Case was put by Serjeant *Astley*: A Lease is made for life by Husband and Wife; and the Covenants were, That he should make such reasonable assurance as the Counsel of the Lessee should advise; and the Counsel advised a Fine with warranty by the Husband and Wife, with warranty against the Husband and his Heirs; and the Defendant did refuse to make the assurance; in an Action of Covenant brought, it was moved, That it was not a reasonable assurance to have a Fine with Warranty, because the Warranty did trench to other Land. But the Court did over-rule it, and said, That it is the ordinary course in every Fine to have a Warranty, and the party may rebut the Warranty.

Pafch. 3. Caroli, in the Kings Bench.

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IT was cited to be adjudged, That if a man purchase the next avoidance of a Church with an intent to present his son, and afterwards he doth present his son, that it is Symony within the Statute of 31. *Eliz.*

Ter. Mich. 4. Caroli, in the King's Bench.

501 HILL and FARLEY's Case.

IN Debt brought upon a Bond, the Case was, A man was bound in a Bond, That he should perform, observe, and keep the Rule, Order, and finall end of the Council of the Marches of *Wales*. And in Debt brought upon the Bond, the Defendant pleaded, That the Council of the Marches of *Wales nullum fecerunt ordinem*. The Plaintiffe replied, That *Concilium fecerunt ordinem*, that the Defendant should pay unto the Plaintiffe an hundred pound. The Defendant did demurre in Law upon the Replication : And the only Question was, If the Plaintiffe in his Replication ought to name those of the Council of *Wales*, who made the Award by their particular names. *Jermyn*, who argued for the Plaintiffe, said, That he ought not to name the Councillors by their proper names ; and therefore he said, That if a man be bounden to perform the Order that the Privy Council shall make, or the Order which the Council should make, That in Debt upon the same Bond, If the Defendant saith that he hath performed *Consilium* generally of the Council, without shewing the particular names of the Councillors, it is good. And he vouched 10. H. 7. 6. 10. E. 4. 15. and Com. 126. Sir *Richard Buckleys* case, That the number of the *Esliors* ought not to be particularly shewed : But in an Action brought upon the Statute of 23. H. 6. he may declare generally, that he was chosen *per majorem numerum*, and that is good. And 10. E. 4. 15. In debt upon a Bond, That the Defendant shall serve the Plaintiffe for a year, *in omnibus mandatis suis licitis* : Th. Defendant said, That he did truly serve the Plaintiff untill such a day as he was discharged ; And it is there holden, that he is not compellable to shew the certainty of the services. *Banks* contrary, and said, That he ought to name the Council by their particular names : And therefore in this case he ought to have pleaded specially, as in 9. E. 4. 24. If a man will plead a Divorce, Deprivation, or a Deraignment, he ought to shew before what Judge the Divorce, Deprivation, or Deraignment was : So 1. H. 7. 10. If a man will plead a Fine, he must shew before what Judges the Fine was levied, although they be Judges of Record. And he took this difference, That the Judges ought to take notice of the Jurisdiction of generall Courts, which are Courts of Record, and of the Customes of those Courts : but of particular Courts which have but particular Jurisdictions, and particular Customes, the Judges are not to take notice of them, nor of the Lawes and Customes of such Courts, if they be not specially shewed unto

unto them. And therefore although it was alledged, That it was the generall usage to plead Awards, or Orders made before the Council of the Marches of *Wales*, as in the principall Case, yet he held that the Judges were not to take notice thereof. And therefore the Countessors who made the Order, ought to be particularly named. 2. He said that the Replication was not good, because the Plaintiffe in his Replication doth not shew that the Order was made by the President, and the Council; for by the Statute of 34. *H.8.* it ought to be made by the President, and the Council. 3. He said, That the Replication was not good, because the Plaintiffe doth not shew within the Record, that the matter of which the Order was made, was a matter which was within their Jurisdiction. It was adjourned.

Mich. 4. Caroli, in the King's Bench.

502 . SHUTFORD and BOROUGHS Case.

IN an Action upon the Case upon a Promise, the Case was this, The Defendant had a dog which did kill five of the Plaintiff's sheep, and the Defendant in consideration the Plaintiff would not sue him for the said sheep; and also in consideration that the Plaintiff would suffer the Defendant to do away the sheep, promised to give him recompence for the said sheep upon request: and the Plaintiffe alledged the promise to be made, 18. *Jacobi*, and that afterwards 2. *Caroli*, he did request so much of the Defendant for the said sheep: The Defendant pleaded in Bar the Statute of 21. *Jacobi*, cap 16. of Limitation of Actions, and alledged, That the Action was not brought within six years after the cause of action accrued: which was the promise. And it was adjudged that the plea in Bar was not good; for it was resolved, That where a thing is to be done upon request, that there, untill request, there is no cause of Action; and the time and place of the request is issuable. And so was resolved, 1. *Caroli*, in the Kings Bench in *Peck's Case*: and *Hill*. 16. *Jacobi*, in the same Court in *Hill and Wades Case*; and in the principall Case the request was, 2. *Caroli*, and that was within the time limited by the Statute of 21. *Jacobi*. And the meaning of the Statute was, but to barre the Plaintiffe but from the time that he had compleat cause of Action, and that was not untill the request made. And when divers things are to be done and performed before a man can have an Action, there all these things ought to be compleated before the Action can be brought. And therefore, If a man promise to pay *l.s.* ten pound when he is married, or when he is returned from *Rome*, and ten years after the promise, *l.s.* marrieth, or returneth from *Rome*, because the marriage,

438 *Floyd and Sir Thomas Cannon's Case.*

age, or the Returne from *Rome* are the causes of the Action, that the party shall have six years after his marriage, or return to bring his Action, although that the promise was made ten years before. And in the principall Case, the cause of Action is the breach, and that cannot be untill after the Request made; and where a Request is material, it ought to be shewed in pleading. And so it was resolved by the whole Court, (*nemine contradicente*) that the Action was well brought, and within the time limited by the Statute. And Judgement was entred for the Plaintiffe.

Mich. 4. Caroli, in the Star-Chamber.

583 *FLOYD and S^r THO. CANNON's Case.*

IT was agreed by the Lord Keeper *Coventry*, and the whole Court in this Case, That if a man did exhibite a Bill against another for oppression; and layeth in this Bill, That the Defendant did oppress *A. B. and C.* particularly, and an hundred men generally; That the Plaintiffe by his witnesses must prove that the Defendant hath oppressed *A. B. and C.* particularly, and shall not be allowed to proceed against the Defendant upon the oppression of the others layed generally, before his particular oppression of *A. B. and C.* be proved. But if the charge layed be general, and not particular, as if the Plaintiffe in his Bill saith, That the Defendant hath oppressed an hundred men generally, there he may proceed and examine the oppression of any of them. And *Richardson* Chief Justice of the Common Pleas said, That if a man exhibiteth a Bill against another for extortion, there the Sum certaine which he did extort, must be laid particularly in the Bill. And he cannot say, that the Defendant did extort divers sums from divers men generally. And so was it adjudged in *Reignolds Case* in this Court. Also in every oppression there ought to be a threatening of the party, for the voluntary payment of a greater sum where a lesser is due, cannot be said extortion. And afterwards the Bill of *Sir Thomas Cannon* was dismissed for want of proofs *ex parte Querentis*.

Mich. 4. Caroli, in the Star-Chamber.

504 • *HUET and OVERIE's Case.*

IN a *Ryot* for cutting of corn. It was agreed by the whole Court, That if a man hath title to corn, although that he cometh with a great

The Earle of Pembroke & Bostock's Case. 439

great number to cut it with Sickles, it is no Riot; but if he hath not any title, although that he doth not come with other Weapons then with Sickles, and cutteth down the Corn, it is a Riot. And it was agreed by the whole Court in this Case, That Witnesſes which were Defendants, and which are suppressed by order of the Court, although that afterwards there be no proceedings against them, yet they shall not be allowed of at the hearing of the Cause in that Court. And this was declared to be the constant rule of that Court.

Trinit. 5. Caroli, in the Kings Bench.

505 *The Earle of PEMBROKE and BOSTOCK's Case.*

IN a *Quare Impedit* Judgment was given; and the same Term a Writ of Error is delivered to the same Court, before a Writ to the Bishop is awarded to admit the Clerk. It was holden by the whole Court, That the Writ of Error ought to have been allowed, without any other Superſedeas, because a Writ of Error is a Superſedeas in it self. *Whitlock Justice*. If in this Writ of Error the Judgement be affirmed, the Defendant in the Writ of Error shall have damage.

506 *The Bailiffs, Aldermen, Burgesſes, and Commonalty of Yarmouth and COWPER's Case.*

IN a *quo Warranto* brought against the Bailiffs, Aldermen, &c. they did appear by Warrant of Attorney; and one of the Bailiffs named in the Warrant did not appear nor agree to it. It was holden by the whole Court, That the appearance of the major or greater part, being recorded, was sufficient. And it was also holden, *per curiam*, that although the Warrant of Attorney was under another Seal, then their common Seal, yet being under Seal, and recorded, it cannot be annulled; *Vide 14. H. 4.* If two Coroners be, and one maketh a return, the same is good; but if the other doth deny it, then it is void.

Mich.

Mich.8. Caroli, in the Kings Bench.

507 LANCASTER'S Case against KIGHTLEY and SINEWS.

Judgement was given in a *Scire facias* against the Bail. A Writ of Error was brought by the Defendant in the principall Action and the Bail. And the opinion of the Court was, That a Writ of Error would not lie, because the Judgements against them were severall, but they ought to have severall Writs of Error. And the books of 3. *H. 7. 14. 3. E. 4. 10. and 2. Eliz. Dyer 180.* were vouched. And so was it adjudged, *Hill. 11. Jacobi, Rot. 1377.* in the Exchequer Chamber, in Doctor Tennants Case. Where a Writ of Error was brought by the Defendant and the Bail; and it was adjudged, that they could not joine in an Writ of Error, but ought to have severall Writs.

Mich.8. Caroli, in the Kings Bench.

508 EVELEY and ESTON'S Case.

IN Trespass; It was found, That a man was Tenant in tail of certain Farme Lands called *Estons*; and that a Fine was levied of Lands in *Estington, Eston* and *Chilford*, whereas *Eston* lay in another Parish, *appell D. Calthrape* argued, That the Land in *Eston* did passe by the Fine, although the Parish was not named; for that the Writ of Covenant is a personall Action, and will lie of Lands in a Hamlet or *lieu commun*, 8. *E. 4. 6. Vide 4. E. 3. 15. 17. Ass. 30. 18. E. 3. 36. 47. E. 3. 6. 19. E. 3. Brev. 767.* 2. He said, That it was good, for that the Plea went only to the Writ in abatement; but when a Concord is upon it, which admits it good, it shall not be avoided afterwards. 3. He said, That a Fine being a common assurance, and made by assent of the parties, will passe the Lands well enough, 7. *E. 4. 25. 38. E. 3. 19.* And he vouched *Pasch. 17. Jacobi*, in the Kings Bench, *Rot. 140. Monk and Butlers* Case. Where it was adjudged that a Fine being but an arbitrary assurance, would passe Lands in a *Lieu commun*; and so he said it would do in a common recovery. And *Richardson* said, That if a *Scire facias* be brought to execute such a recovery, *Nul tiel ville ou Hamlet*, is no plea, and the Fine or recovery stands good, *Vide 44. E. 3. 21. 21 E. 3. 14 Stone.* And the opinion of the Court was, That the Lands did well passe by the Fine.

Mich.

Mich. 8: Caroli, in the Kings Bench.

509

CAWDRY and TETLEY's Case.

Cawdry being a Doctor of Physick, the Defendant *Pramissorum non ignorans*, to discredit the plaintiff with his Patients, as appeared by the Evidence, spake these words to the plaintiffe, viz. Thou art a drunken Fool, and an Ass; Thou wert never a Scholer, nor ever able to speak like a Scholer: The opinions of *Jones* and *Crook* Justices, were, that the words were actionable, because they did discredit him in his Profession; and hee hath particular losse, when by reason of those words, others do not come to him. And *Palmer's* Case was vouched: Where one said of a Lawyer, Thou hast no more Law then a Jackanapes; that an Action did lie for the words: Contrary, if he had said, No more Wit. And *William Waldrons* Case was also vouched; where one said, I am a true Subject, thy Master is none; that the words were actionable.

Mich: 4. Caroli, in the Kings Bench.

510 The King, and BAXTER & SIMMON'S Case.

THE Case was this, Tenant in tail the Remainder in taile, the Remainder in Fee to Tenant in tail in possession: Tenant in tail in Remainder by Deed enrolled, reciting that he had an estate tail in Remainder, Granted his Remainder and all his estate and right unto the King and his Heirs, *Proviso*, that if he pay ten shillings at the Receipt of the Exchequer, that then the Grant shall be void. Tenant in tail in possession suffers a common Recovery, and afterwards deviseth the Lands to *J. S.* and dieth without Issue 18. *Jacobi*. Afterwards 21. *Jac.* he in the Remainder in tail dieth without issue; but no seisure is made, nor Offence found, that the lands were in the Kings hands.

Noy, who argued for the King: The first Point is, When Tenant in taile recites his estate, and grants all his estate and right to the King and his Heirs, what estate the King hath? And if by the death of Tenant in tail without issue, the estate of the King be so absolutely determined, that the Kings possession needs not to be removed by *Amoveas manum*: And he argued, That when the Lands are once in the King, that they cannot be out of him again, but by matter of Record. 8.E.3. 12. Com. 558. And

442 *The King & Baxter & Simmons Case.*

a bare entry upon the King, doth not put the King out of possession of that which was once in him: And so was it adjudged 34. *Eliz.* in the Lord *Pages's* Case, as *Walter* chief Baron said. And *Noy* took this difference, 8. *H. 5. Traverses* 47. and 8. *E. 2. Traverses* 48. If a particular estate doth determine before that the King seise, there the King cannot afterwards seise the Lands. But if the King hath once the Lands in his hands or possession, there they cannot be divested out of him but by matter of Record. So *F. Nat. Br.* 254. If a man be seised of Lands in the right of his Wife, and be outlawed for Felonie, for which the Lands come into the Kings hands, and afterwards hee who is outlawed dieth; there a Writ of *Diem clausit extremum* shall issue forth: which proveth, That by the death of the Husband the Lands are not immediately out of the King, and settled in the Wife againe. 22. *E. 4. Fitz. Petition* 9. Tenant in taile is attainted of Treason, and the Lands seised into the Kings hands; and afterwards Tenant in taile dieth without Issue, he in the Remainder is put to his Petition: which proveth, that the Lands are not presently after the death of Tenant in taile without issue, out of the King. But he agreed the Cases: If Tenant in taile acknowledged a Statute, or granteth a Rent charge, and dieth, that the Rent is gone and determined by his death, as it is agreed in 14. *Affisurum*. The second point argued by *Noy*, was; That although that there was not any seizure or Offence found which entituled the King, Yet the Deed enrolled in the Chancery, which is returned in this Court, did make sufficient title for the King: & as 8. *E. 3. p. 3.* is, The Judges of Courts ought to Judge upon the Records of the same Courts. In 8. *H. 7. 11.* a Bayliff shewed, That a Lease was made to *T.* his Master for life, the Remainder to the King in Fee, and prayed in Ayd of the King: And the Plaintiff in Chancery prayed a *Procedendo*: And it was ruled That a *Procedendo* should not be granted without examination of the Kings title. Thirdly, he said, That in this case he who will have the Lands out of the possession of the King, ought to shew forth his title; and in the principall case it doth not appear that the Defendant had any title. *Vide* 10. *H. 7. 13.* *Arborne* Serjeant argued for the Defendant, & he said, That in this case the King had an estate but for the life of Tenant in tail, And therefore he said, That If Tenant in tail grant *totum statum suum*, that an estate but for his own life passeth, as *Litt. is*, 145. and 13. *H. 7. 10. acc.* So If Tenant for life the remainder in taile bee, and he in the Remainder releaseth to Tenant for life in possession, nothing passeth but for the life of Tenant in tail. 19. *H. 6. 60.* If Tenant in tail be attainted of Treason or Felonie, and Offence is found, and the King seiseth the lands, he hath an estate but for the life of Tenant in tail. And he cited 35. *Eliz. C. 2* part 52. *Blishmans* case. Where Tenant in tail Covenanted to stand seized to the use of himself for his own life, and after his death to the use of his eldest son in tail, and afterwards he married a wife and died; that the wife should not be endowed:

The King, & Baxter & Simmons Case. 443

dowed: for when he had limited the use to himself for his life, he could not limit any Remainder over. And *Edwards Case*, adjudged in the Court of Wards, which was, That there was Tenant for life the Remainder in tail, he in the Remainder granted his Remainder to *J. S.* and his heirs; and afterwards Tenant for life dyed, and then the grantee dyed, his heirs within age, & it was adjudged that the heir of the grantee should not be in ward, because the Tenant in tail could not by his Grant grant a greater estate then for his own life. But he said, That in the principall Case it appeareth, That the Tenant in tail in Remainder hath particularly recited his estate. And where it appeareth in the Conveyance it self, that he hath but an estate in tail, a greater estate shall not passe. As if Tenant for life granteth a Rent to one and his heirs, the same at the first sight seems to be a good Rent in Fee; but when it appeareth in the Conveyance that the grantor was but Tenant for life, there, upon the Construction of the Deed it self, it cannot be intended that he granted a Fee, but that an estate for life passed only in the Rent. Secondly. he argued, That although the estate in tail in the principall case was an abeyance; Yet a Common Recovery would barr such estate tail in abeyance. And therewith agreeth *C. 2. part St. Hugh Cholmleys Case. 3.* He said, That the estate was out of the King, and vested in the party without any Offence found, as *49. E. 3. Isabell Goodcheaps case.* A man devised houses in London holden of the King in tail, and if the Donee dyed without Issue, that the Lands should be sold by his Executors. The devisee died without Issue, The bargain and sale of the Lands by the Executor doth divert the estate out of the King without Petition, or *Monstrans de Droit.* So, If there be Tenant in tail the Remainder in tail, and Tenant in tail in Remainder levieth a fine of his Remainder to the King, and afterwards dyeth without Issue, the Kings estate is determined, and there needs no Petition or *Monstrans de Droit.* 4. He said, That in the principall case, nothing was in the King, because it doth not appeare that there was any seisure, or Offence found to entitle the King. And the Tenant in tail in the Remainder died in the life of King *James*; and then if the Kings estate were then determined as before by the death of the Tenant in taile, the King which now is never had any title. And hee said, that he needed not to shew a greater title then he had. And hee took a difference when Tenant in taile doth onely defend or make defence, and when he makes title to Lands; in the one Case he ought for to shew, That the Tenant in taile died without issue, and in the other Case not: And therefore in the principall case he demanded Judgment for the Defendant. The Case was adjourned to another day.

Mich. 4. Caroli, in the Star-Chamber.

511 TAILOR and TOWLIN'S Case.

A Bill was preferred against the Defendant, for a Conspiracy to Indict the plaintiff of a Rape. And the Plaintiff aledged in his Bill, That an Indictment was preferred by the Defendant against the Plaintiff before the Justices of Assise and *Nisi prius* in the County of Suffolk; And did not lay it in his Bill, that the Indictment was preferred before the Justices of *Oyer and Terminer*, and Gaole delivery: and the same was holden by the Court to be a good Exception to the Bill, for that the Justices of Assise and *Nisi prius*, have not power to take Indictments. But afterwards upon view of the Bill, because the Conspiracy was the principall thing tryable and examinable in this Court, and that was well layd in the Bill, the Bill was retayned, and the Court proceeded to Sentence. And in this Case *Richardson* Justice said, That in Conspiracy the matter must bee layed to be *false et malitiose*: and if it be layed for a Rape, It must be layd, that there was *recens persecutio* of it, otherwise it will argue a Consent. And therefore, because the Defendant did not preferre an Indictment of Rape, in convenient time after the Rape supposed to be done, but concealed the same for half a years time, and then would have preferred a Bill of Indictment against the plaintiff for the same Rape, he held that the Indictment was false and malicious. And *Hyde* Chief Justice said, That upon probable proof a man might accuse another before any Justice of Peace, of an Offence; and although his accusation be false, yet the Accuser shall not be punished for it. But where the Accusation is malicious and false, it is otherwise; and for such Accusation he shall be punished in this Court.

Trinit. 8. Caroli, in the King Bench.

513 JONES and BALLARD'S Case.

A N Action upon the Case was brought for these words, viz These *Jones* are proper Witnesses, they will swear any thing; They care not what they say; They have already forsworn themselves in the Chancery, and the Lord keeper Committed them for it. *Jermyn*. took Exceptions, because it was not said to be in the Court of Chancery;

cery ; nor that it was in any Deposition there taken upon Oath. But it was adjudged *per Curiam*, That the Action would lie ; and *Jones* Justice said, that the Addition [in the Chauncery] was as much as if he had said, he was perjured there. And *Hemfries* case was vouched by him : Where one said of a Witness, presently after a Tryall at the Guild Hall in London, You have now forsworn your self, That it was adjudged that the words were actionable.

Trinit. 8. Caroli, in the Kings Bench.

513. SYMME's and SMITH's Case.

A Woman being entituled to copyhold Lands of the Manor of D, did covenant, upon reasonable request to be made unto her, to surrender the Copy-hold Land according to the Custome of the Manor. And it was found That the Custome of the Manor is, That a surrender may be made either in person, or by Letter of Atturney : and that the plaintiff did request the woman to make the surrender by a Letter of Atturney ; which shee refused to do. And whether shee ought to surrender presently, or might first advise with her Councell, was the Question. It was argued for the plaintiff, that shee ought to do it presently : And *Munser's Case*, C. 2. part, and 16. Eliz. Dyer. 337. Sir *Anthony Cooks Case* were vouched, that she was to do it at her perill : And the Election in this Case was given to the Covenanttee ; and hee might require it to be done either in Court in person, or by Letter of Atturney : And C. 2. part, Sir *Rowland Heywards Case* : and C. 5. part, *Hallings Case* was vouched to that purpose. *Rolls* contrary, for the Defendant : And he said, That the woman was to have convenient time to do it : and the words are upon reasonable request, which implies a reasonable time to consider of it : And there might be many occasions, both in respect of her self and of the Common weakh, that she could not at that time do it. And *Hill. 37. Eliz. in the Common Pleas*, *PERPOYNT* and *THIMBELBYES Case* : A man Covenants to make Assurances ; It was adjudged hee shall have reasonable time to do it : In 27. Eliz. the opinion of *Popham* was, That if a man be bounden to make such an Assurance as Councell shall advise : there, if Councell advise an Assurance, he is bound to make it. But if it were such [Reasonable Assurance] as Councell shall advise ; There, If the Councell do advise, That he shall enter into, seale and deliver a Bond of

of a thousand pound for the payment of an hundred pound at a day; hee is not bound to doe it, because it is not reasonable. *Vide 9. Ed. 4. 3. cap. 6. part Bookers Case. Doff. & Stud. 36. 14. H. 8. 23.* Secondly, He said, That the request in the principall Case was not according to the Covenant: for the election in this case was on the womans part, and not on the Covenantees part, and shee was to doe the act, viz. to surrender: And where election is given of two things, the same cannot be taken from the party: and if it should be so in the principall Case, the Covenantee should take away the election of the Covenantant. And where the manner of Assurance is set down by the parties, there they cannot vary from it; and in this case the manner is set down, in which the Covenantant hath the election, because shee is to do the act. And hee said, That the woman was not bounden afterwards to surrender in Court upon this request, because the request was as it were a void request: And it is implied by the words, That shee in person ought to make the Surrender: and so hee prayed Judgment for the Defendant. It was adjourned.

Trinit. 8. Caroli, in the King's Bench.

514. *HYE and Dr. WELLS Case.*

DOctor William Wells sued Hye in the Ecclesiasticall Court for Defamation; for saying to him, that hee lyed: And the Plaintiffe prayed a Prohibition: It was argued for the Defendant, that in this Case no Prohibition should goe; For it was said, that by the Statute of 21. Edw. 1. of Consulation; When there is no Writ given in the Chancery for the party grieved in the Temporall Court, there the Spirituall Court shall have the Jurisdiction: and in this Case there is no Writ given by Law. And *Fitzherbert Natura Brevium 53. b.* a Consultation doth not lie properly, but in case where a man cannot have his Recovery by the Common Law in the Kings Courts: for the words of the Writ of Consulation are, viz. *Provisio quod quicquid in juris nostri regii derogationem cedere valeat aliquantisper per vos nullatenus attemptetur:* And *Vide Register 149. Falsarius* is to be punished in the Spirituall Court. And *Fitzherb. Nat. Brev. 51. I.* A man may sue in the Spirituall Court, where a man defames him, and publisheth him for false. *Vide Linwood in cap. de foro competenti. acc.*

Trin. 6. Jacobi, in the Common Pleas, *Boles Case*, *Rot. 2733*. A man called a poor Vicar, poor rascally Knave; for which the Vicar sued him in the spirituall Court: And by the opinion of the whole Court, after a Prohibition had been granted, upon further advice a Consultation was granted. 1. It was objected, That the party might be punished by the Temporall Judges and Justices for the words. To which it was answered, That although it might be so, (which in truth was denied,) yet the party might sue for the same in the spirituall Court. And many Cases put, That where the party might be punished by either Lawes, that the partie had his election in what Court he would sue. And therefore it was said, That if a man were a drunkard, he might be sued in the Ecclesiastical Court for his drunkennesse; and yet he might be bounden to his good behaviour for the same by the Justices: so the imputed father of a Bastard child, may be sued for the offence either in the spirituall Court, or at the Common Law by the Statute of 18. *Eliz.* and 7. *Jacobi*. So *F.N.B. 52. k.* If a man sue in the spirituall Court for taking and detaining his wife from him to whom he was lawfully married; if the other party sue a Prohibition for the same, yet he shall have a Consultation *quatenus, pro restitutione uxoris sue duntaxit persequitur*; and yet he may have an Action at the Common Law *De uxore abducta cum bonis viri*; or an Action of Trespasse. *Maynard*, contrary. By the Statute of *Articuli Cleri*, although that the words be generall, yet they do not extend to all defamations. And by Register 49. where the Suit is for defamation, there the Cause ought to be expressed. & ought to be wholly spirituall, as the Book is in 29. *E. 3.* and *C. 7.* part in *Kenn's Case*: And in the principal Case, It is not a matter affirmative which is directly spirituall: And therefore 22. *Jacobi*, where a Suit was in the Ecclesiastical Court for these words; Thou art a base and paultery Rogue, a Prohibition was awarded. And so *Vinor* and *Vinors Case*, *Trinit. 7. Jacobi*, in the King's Bench, Thou art a drunken woman, Thou art drunk over night, and mad in the morning. 2. Hee said, That *Crimen falsi* in the spirituall Court, is meant of counterfeiting of the Seal, or of Forgery: and *Crimen falsi* cannot be intended a lie. If in ordinary speech one sayes, That's a lie; If the other reply, You lie; that is no defamation: for *Qui primum peccat ille facit rixam*. *Trinit. 42. Eliz.* *Lovegrove* and *Briwens Case*. A man said to a Clark, a spirituall Person, Thou art a Woodcock, and a Foole: for which words he sued him in the spirituall Court; and in that Case, a Prohibition was awarded. It was adjourned.

Trinit. 8. Caroli, in the Kings Bench.

515

GWYN and GWYN's Case.

A *Quod si de forceat* was brought against two, they appeared and pleaded severall Pleas, and the issues were found against both of them, and a joint Judgement was given against them both; and they brought a Writ of Error thereupon in the Kings Bench. And the opinion was, That the Judgement was Erroneous, and that the Writ of Error would well lie. So in a Writ of Dower brought against two Tenants in common, who plead severall Pleas, the Judgement must be according to the Writ. But *Barkley* said, That if in a Writ of right by two, the Mife is joyned but in one Issue, where severall Issues are, the Judgment ought to be severall. *Quare, quia obscure.*

Trinit. 8. Caroli, in the Kings Bench.

516

B. LAND'S Case.

THE Case was this, *Thomas Spence* was a Lessee of Lands for one hundred years; and he and *Jane* his Wife, by Indenture, for valuable consideration, did assign over to *Tisdale*, yeilding and paying to *Thomas Spence* and his Wife and the Survivor, the Rent of seventeen Pounds yearly, and every year during the terme; *Proviso*, that if the Rent be arrere by forty daies, that *Thomas* and his Wife, or the Survivor of them should enter. *Thomas Spence* died, his Administrator did demand the Rent, and being denied, entred for the Condition broken. *Calthrope* argued, That the reservation to the Wife was void because she had not any interest in the Land, and also never sealed the Indenture of Assignment, but was as a stranger to the Deed, and so he said that the Wife could not enter for the condition broken, nor make any demand of the Rent. The 2^d Point was, Admitting that the wife could not enter, nor demand the Rent; Whether the Administrator of the Husband might demand it and enter for the condition broken; because the words are, Yeilding and paying to *Thomas Spence* and *Jane* his Wife, and the Survivor of them during the term, and no words of Executors or Assigns are in the Case: and he conceived the Administrator could not; and so he said it had been resolved in one *Butcher* and *Richmonds Case*, about 6. *Jacobi*. *Banks* contrary, and he said, It was a good Rent and well demanded, and the reservation is good during the Term, to the Husband.

Husband and Wife; and although the word *Reddendo* doth not create a rent to the Wife, because the Husband cannot give to the Wife; yet the *Solvendo* shall gain a good rent to the Wife, during the life of the Wife; and the reservation shall be a good reservation to him and his Administrators during the Survivor. *Vide C. 5. part Goodales Case 38. E. 3. 33. 46. E. 3. 18.* and admitting that the rent shall be paid to the Wife, yet the condition shall go to the Administrator. 2. The word *Solvendo* makes the Rent good to the Wife, and amounts to an agreement of the Lessee to pay the Rent to them, and the Survivor of them; and that which cannot be good by way of reservation, yet is good by way of grant and agreement; and many times words of reservation or preception, shall enure by way of grant. *Vide 10 E. 3 500. 10. Ass. 40. 8. H. 4. 19. Richard Colingbrooks Case. 41. E. 3. 15. 13. E. 2. Feasts and Fasts 108. Richardson Justice, The Reservation being during the term, is good, and shall go to the Administrator. Jones Justice contrary, It is good only during the life of the Lessor; and so was it adjudged in Edwyn and Wottons Case, 5. Jacobi. Crook Justice accorded, The Administrator hath no title, and the Wife is no party to the Deed, and therefore the Rent is gone by the death of the Husband. If it had been *durante termino* generally, perhaps it had been good; but *durante termino predicto* to him and his Wife, it ceaseth by his death. And the words *durante termino*, couple it to him and his Wife, and the Survivor; and it cannot be good to the Wife who is no party, nor sealed the Deed; neither can it inure to the Wife by way of Grant. And the words *Reddendo* and *Solvendo* are *Synonima*; and the Administrator is no Assignee of the Survivor, for she cannot assign because she hath no right in the Rent. Barkley Justice, The intention of the parties was, That it should be a continuing Rent, and Judges are to make such Exposition of Deeds, as that the meaning of the parties may take effect. I do agree, That the Wife could not have the Rent, neither by way of Reservation, nor by way of Grant, if she were not a party to the Indenture: but here she is a party to the Deed; for it is by Deed indented made by the husband and wife, and the husband hath set his Seal to it. And 2. The *Solvendo* doth work by way of Grant by the intent of the parties: The *Reddendo* shall go and relate as to the husband, and the *Solvendo* to the wife; and he agreed the Case 33. H. 8. Br. Cases: because there *expressum facit cessare tacitum*; but in case of a Lease for years, the words, [Reserving Rent to him] shall go to the Executor, who represents the person of the Testator; and 27. El. it was adjudged in Constables Case; and Littleton agrees with it, That the Executor shall be possessed and is possessed in the right of his Testator. And therefore if an alien be made an Executor, in an Action brought by him the Tryal shall not be *per medietatem lingue*. And this Case is the stronger, because the Reservation is during the Term. And C. 3. part*

in *Malleries Case*, That the Law shall make such a construction upon reservation of Rent upon a Lease as may stand with the intent and meaning of the parties; and therefore in that, where an Abbot and Covent made a Lease for years, rendring Rent yearly during the Term, to the Abbot and Covent or to his Successors, it is all one as if it had been to him and his Successors; and although the words be joint or in the Copulative, yet by construction of Law, the Rent shall be well reserved during the terme; for if the reservation had been only Annually during the terme, it had been sufficient, and his Successors should have had the Rent. *Quare* the principall Case, for the Judges differed much in their opinions.

Hill.8. Caroli, in the Kings Bench.

517

The KING against HILL.

AN Information was by the KingsAttorney against *Hill* and others, upon the Statute of 32. H. 8. of Maintenance. Where the Point was, A man was out of Possession, and recovered in an *Ejectione firme* in May 2. Car. and *Habere Possessionem* was awarded; and 29. Sept. 4. Car. he sold the Land: And whether he might sell presently, or not? was the Question. And it was determined, That he being put in possession by a Writ of *Habere facias possessionem*, that he might sell presently. *Vide Com. Crookers Case*; and *C. Littl. acc.* and so was it holden in Sir *John Offley's Case* 7. Car. in this Court. *Barkley Justice*, If a Disseisor doth recover in an *Ejectione firme*, if he afterwards sell the Land, it is a pretended Title. *Jones Justice*, It was adjudged 36. El. in the Common Pleas, in *Pages Case*, in the Case of a Formedon, That if a man be out of Possession for seven years, and afterwards he recover, that he may sell the Lands presently. *Crook Justice*, There is a difference where the recovery is in a reall Action, and where it is in an *Ejectione firme*. It was Master *Brownelors Case* in the Star-Chamber, resolved by all the Judges of *England*, That a Suit in Chancery cannot make a Title pretended nor Maintenance. *Barkley Justice* put this Case, If Husband and Wife bargaineth and selleth, whereas the Wife hath nothing in the Land, and afterwards a Fine is levied of the same Lands by the Husband and Wife, it shall have a relation to conclude the Wife, and to make the Wife to have a Title *ab initio*. It was adjourned.

Pasch. 10. Caroli, in the Kings Bench.

518

BARKER and TAYLOR's Case.

IN an *Ejectione firme*, the Case upon the Evidence was this, Two Coparceners, Copy-holders in Possession; the one did surrender his reversion in the moiety after his death. *Charles Jones* moved, That nothing did passe, because he had nothing in Reversion. *Vide C. 5. part Saffyns Case*. If a man surrendreth a Reversion, the Possession shall not passe. 2. It is not good after his death; so was it adjudged in *C. 2. part Buckler and Harvey's Case*. *Curia*, The Surrender is void, and the same is all one, as well in the Case of Copy-hold as of Free-hold: and so was it adjudged 26. *El.* in *Platts Case*; and so also was it adjudged in this Court, 3. *Caroli* in *Simpsons Case*.

Pasch. 13. Caroli, in the Kings Bench.

519

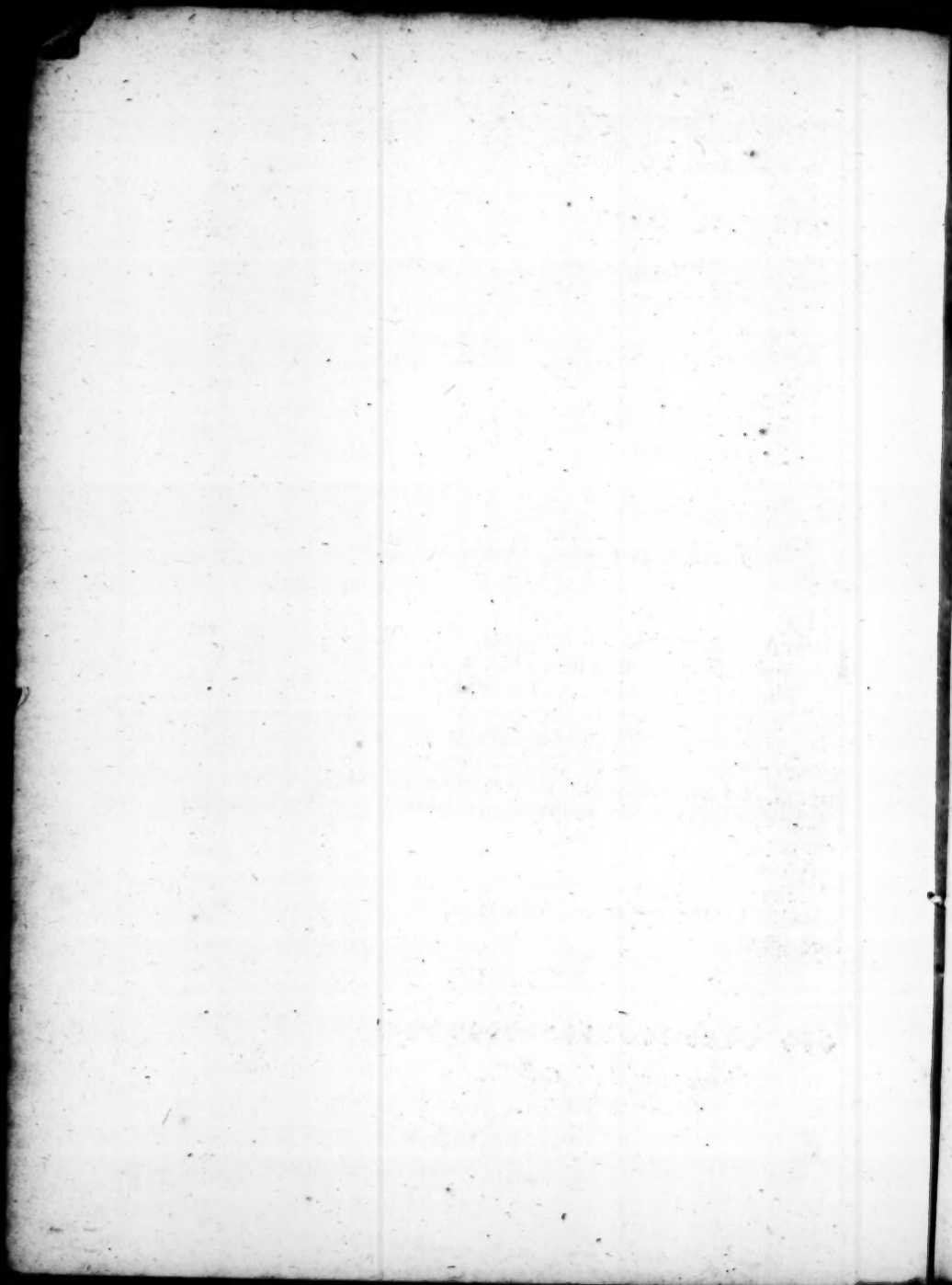
HUMFREYS and STUDFIELD's Case.

IN an Action upon the Case for words, the Plaintiff did declare, That he was Heir apparant to his Father, and also to his younger Brother, who had purchas'd Lands, but had no Issue, either Male or Female; and that the Defendant, with an intent to bring him in disgrace with his Father, and also with his younger brother; and thereby to make the Father and younger Brother to give away their lands from the Plaintiff, did maliciously speak these words to the Plaintiff, Thou art a Bastard, which words were spoken in the presence of the Father and younger Brother; by reason of speaking which words, the Father and younger Brother did intend, and afterwards did give their Lands from the Plaintiff. And by the opinion of the whole Court it was adjudged, That the words were Actionable, and Judgement entred accordingly.

FINIS.

*I have perused this Collection of Reports, and think them
fit to be printed.*

Per me JOHANNEM GODBOLT,
Unum Justiciar' de Banco
18. Jun. 1648.



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